

No. 10035

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE B. F. GOODRICH COMPANY, a corpora-
tion,

Appellant;

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division.

In Law No. 8138-M

THE B. F. GOODRICH COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION.

(Action for money had and received—For recovery of taxes erroneously collected)

Comes now plaintiff, The B. F. Goodrich Company, a corporation, and for its cause of action alleges:

I.

This action is brought against the United States of America as defendant for the reason that the person, namely John P. Carter, who was Collector of Internal Revenue at Los Angeles, California, for the Sixth District of California, at the time of payment under protest of the amounts for the recovery of which this action is brought, died prior to the commencement of this action and on or about the 24th day of April, 1935.

II.

Plaintiff now is and at all times hereinafter mentioned was a corporation organized and existing

under and by virtue of the laws of the State of New York; that it is qualified to do business in the State of California, and has its principal office and place of business at Akron, Ohio, with an office in Los Angeles, California.

That defendant herein, the United States of America, now is and at all times mentioned herein was a body politic.

III.

That on June 30, 1934, plaintiff became owner of all the rights, claims and choses in action of every nature and description [2] which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter, under an assignment from the said Pacific Goodrich Rubber Company to the plaintiff, in which all of the assets above described were sold, transferred, assigned and set over to the plaintiff, all as is shown by copy of said assignment, a full, true and correct copy of which assignment hereinafter follows, is hereby referred to and made a part of this petition.

"ASSIGNMENT

Know All Men by These Presents that Pacific Goodrich Rubber Company, a corporation duly organized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good

and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

To Have and to Hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any

proceedings at law or in equity therefor and to give effectual discharge thereof.

And said Pacific Goodrich Rubber Company does hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

In Witness Whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal to be affixed hereto by its President and Secretary as of the 30th day of June, 1934.

Attest:

S. M. JETT

Secretary.

PACIFIC GOODRICH
RUBBER COMPANY,

By J. D. TEW

President." [3]

IV.

That during his lifetime and during the time when the amounts herein paid were sought to be recovered, John P. Carter was the duly appointed

qualified and acting Collector of Internal Revenue for the Sixth District of California.

V.

That this is an action arising under the laws of the United States levying and providing for the collection of internal revenue, and more particularly under the Act of June 6, 1932, Chapter 209, Section 202, 47 Stat. 261, as modified by the Act of August 12, 1933, Chapter 25, Section 9(a), 48 Stat. 35, and is for the recovery of a manufacturer's excise tax on rubber tires or casings erroneously and illegally collected from the Plaintiff by the Defendant.

VI.

That, under Section 16 of the Agricultural Adjustment Act (Public No. 10, 73d Congress), the plaintiff was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933, (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture), in an amount equivalent to the tax which would have been paid on said cotton had it actually been processed after August 1, 1933, i. e., \$0.044184 per pound; that under Section 9(a) of said Agricultural Adjustment Act, plaintiff was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the Revenue Act of 1932

by deducting from the weight of said tires the weight of processed cotton in said tires upon which a processing tax had been paid under Section 9(a) or Section 16(a) of the Agricultural Adjustment Act.

VII.

That said defendant and said Collector of Internal Revenue refused to permit plaintiff to take credit against excise [4] tax on articles processed wholly or in chief value from cotton in its inventory on August 1, 1933, despite the fact that the processing tax had theretofore been duly paid by the plaintiff upon cotton contained in such articles under Section 16(a) of the Agricultural Adjustment Act, and said defendant and said Collector of Internal Revenue erroneously and illegally demanded payment by plaintiff of \$..... with interest of \$....., and said defendant and said Collector of Internal Revenue erroneously collected from plaintiff, and the same was turned over to defendant, the sum of \$15,880.64 on or about April 17, 1934, and \$569.75 on or about July 27, 1934.

VIII.

That plaintiff, on or about the day of August, 1935, duly filed with Nat Rogan, successor of said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, in Los Angeles, its Claim for Refund of said tax and interest in the aggregate sum of \$16,450.39, paid by plaintiff on

April 17, 1934, and July 27, 1934, as set out above, together with interest thereon from the date of such erroneous payment to the date of the allowance of refund, and that the grounds set forth in said Claim for Refund were as follows:

“Under the provisions of this section, (9(a) of the Agricultural Adjustment Act), the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that the taxpayer is not entitled to the credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitled taxpayer to a credit of the amount of tax and interest above claimed.”

. That a full, true and correct copy of said Claim hereinafter follows, is hereby referred to and by this reference is incorporated herein and made a part of this petition. [5]

vs. United States of America

9

AMENDED CLAIM

Form 843

**Treasury Department
Internal Revenue Service**

Revised June, 1930

**To Be Filed with the Collector Where Assessment
Was Made or Tax Paid**

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss:

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company.

Business address—(Street) 5400 E. Ninth Street,
(City) Los Angeles, (State) Calif.

Residence.....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—
Los Angeles, California.

2. Period (if for income tax, make separate form for each taxable year) from....., 19....., to....., 19.....

3. Character of assessment or tax—Excise tax.

4. Amount of assessment, \$16,450.39; dates of payment April 17, July 27, 1934.

5. Date stamps were purchased from the Government

6. Amount to be refunded, \$16,450.39 plus interest

7. Amount to be abated (not applicable to income or estate taxes) \$.....

8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the 6th District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of \$.044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act.

that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor-tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the

taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand, or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [6]

Certificate

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer, shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing

that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [7]

That said Claim was rejected by the Commissioner of Internal Revenue under date of May 22, 1936, along with an amended claim, filed as hereinafter stated.

IX.

That plaintiff, on or about April, 1936, duly filed with Nat Rogan, the successor to said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, its amended Claim for Refund of said tax and interest, in the aggregate sum of \$16,450.39, paid by plaintiff as above set forth, and the grounds set forth in said Amended Claim were as follows:

"During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the Sixth District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of \$.044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon

tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of the said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes

levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid."

That a full, true and correct copy of said Amended Claim hereinafter follows, is hereby referred to and is by reference incorporated herein and made a part hereof. [8]

CLAIM

Form 843

Treasury Department
Internal Revenue Service

Revised June, 1930

To be filed with the Collector where Assessment
was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

(x) Refund of tax illegally collected.

- () Refund of amount paid for stamps unused,
or used in error or excess.
- () Abatement of tax assessed (not applicable
to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of Taxpayer or purchaser of stamps The
B. F. Goodrich Company.

Business address 5400 E. Ninth Street,

(Street)

Los Angeles, California.

(City) (State)

Residence.....

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed
Los Angeles, California.

2. Period (if for income tax, make separate form
for each taxable year) from....., 19...., to
....., 19....

3. Character of assessment or tax excise tax.

4. Amount of assessment, \$16,450.39; dates of
payment April 17; July 27, 1934.

5. Date stamps were purchased from the Govern-
ment.....

6. Amount to be refunded.....\$16,450.39
plus interest.

7. Amount to be abated (not applicable to income or estate taxes).....\$.....

8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H. R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company,

a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [9]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts

sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [10]

X.

That on or about May 25, 1936, plaintiff received from The Commissioner of Internal Revenue a notice dated May 22, 1936, that the said Amended Claim for Refund of said additional assessment and interest was rejected by the Commissioner of Internal Revenue on May 22, 1936, and neither said amount collected from plaintiff nor any part thereof has been repaid to the plaintiff.

XI.

That on August 1, 1933, the plaintiff held for sale or other disposition articles processed wholly or in chief value from cotton, to-wit, tire fabric, thread and other materials, having a total cotton content of 784,177 pounds; that the plaintiff, according to law and the Regulations of the Secretary of the Treasury, promulgated in pursuance to said law, duly prepared and filed with said John P. Carter, Collector of Internal Revenue, its return and amended return showing said cotton content in detail, and paid to said Collector of Internal Revenue for defendant, and the same was paid and turned over to defendant by said Collector of Internal Revenue, a tax thereon at the rate of \$0.044184 per pound, which was the rate fixed by the Secretary of Agriculture in accordance with the provisions of the Agricultural Adjustment Act; that plaintiff paid to said Collector of Internal Revenue for defendant and the same was paid and turned

over to defendant under said return, the sum of \$34,648.08 in four installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,662.03

That despite the fact that the tax levied and collected was erroneously and illegally levied and collected, no part of the above named tax has been received by, refunded or credited to the plaintiff.

[11]

XII.

That from August 1st through the 15th day of September, 1933, the plaintiff manufactured and sold tires which contained 757,260 pounds of the above mentioned 784, 177 pounds of articles processed wholly or in part from cotton and which was in plaintiff's inventory, and, on August 1, 1933, being held for sale or other disposition by the plaintiff, and upon which a tax at the rate of \$0.044184 per pound had been paid as above set forth.

XIII.

That for the months of August, September, October, November and December, 1933, the plaintiff filed with said John P. Carter, Collector of Internal Revenue, its manufacturers' excise tax returns in accordance with the law and regulations of the Secretary of the Treasury, and paid to said Col-

lector of Internal Revenue for and the same was paid and turned over to defendant, the taxes disclosed by said returns to be due and owing on the tires sold during said months, under the provisions of Section 602 of the Revenue Act of 1932; that the plaintiff computed the aforesaid taxes by deducting from the weight of the tires so sold the weight of the articles processed wholly or in chief value from cotton, contained therein, including in said deduction the above described 757,260 pounds of articles processed wholly or in chief value from cotton upon which a tax had theretofore been paid at the rate of \$0.044184 per pound as hereinbefore alleged. That on or about April 1934, the defendant and the said Collector of Internal Revenue for defendant assessed an additional manufacturer's excise tax against plaintiff for the months of November and December, 1933, in the sum of \$15,880.64, with interest in the sum of \$569.75, and that said additional assessment erroneously and illegally included an additional excise tax at the rate of 2½¢ per pound upon said 757,260 pounds of articles processed wholly or in chief value from cotton, which amount the plaintiff had [12] deducted from the weight of tires sold by it during the months of August and September, 1933, as above alleged.

XIV.

Upon demand by defendant and said John P. Carter, Collector of Internal Revenue, plaintiff on

April 17, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, the sum of \$15,880.64, and on July 27, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, interest according to the said demand in the sum of \$569.75; that said payments were made by the plaintiff under protest that such assessment was erroneous and illegal and was made solely to avoid interest and penalty, of which fact the defendant was duly advised at the time of said payments.

XV.

That at the time said additional tax was assessed, the defendant and the said John P. Carter, Collector of Internal Revenue, for convenience in arriving at the additional tax and interest which defendant and said Collector of Internal Revenue claimed to be due from plaintiff to defendant, determined that such assessment should be levied for the months of November and December; that the plaintiff did not object to this action if assessment were to be made, but did object to any additional assessment being made.

XVI.

That plaintiff has not included any of the tax which it herein seeks to recover in the price of the article with respect to which the said tax was imposed nor has it collected the amount of the said tax from the vendees of said article.

XVII.

That by reason of the premises, defendant became and is indebted to plaintiff in the sum of \$16,450.39, together with interest, after allowing all just credits and offsets. [13]

XVIII.

That plaintiff is and always has been the sole owner of the Claim herein referred to since June 30, 1934, and has not assigned or transferred said claim or any part thereof or any interest therein.

Wherefore, the plaintiff prays judgment against the defendant, United States of America, in the sum of \$16,450.39, with interest thereon at the rate of six per cent (6%) per annum, upon the sum of \$15,880.64 from April 17, 1934, and interest at said rate upon the sum of \$569.75 from July 27, 1934.

**THE B. F. GOODRICH
COMPANY**

**By ANDREWS, BLANCHE
& KLINE,
And EUGENE H. BLANCHE**

Its Attorneys

[Endorsed]: Filed Oct. 1, 1937. R. S. Zimmerman, Clerk, By Edmund L. Smith, Deputy. [14]

[Title of District Court and Cause.]

**AFFIDAVIT OF SERVICE BY MAILING—
(PETITION)**

State of California,
County of Los Angeles—ss.

Blanche Swan, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 414 Union Oil Building, 617 West 7th Street, Los Angeles, California; that on the 5th day of October, 1937, affiant served the Petition on file in this action by placing a true copy thereof in an envelope addressed as follows: "Honorable Homer C. Cummings, United States Attorney General, Washington, D. C." and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, and that said envelope was mailed to said Homer C. Cummings by registered mail.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

BLANCHE SWAN

Subscribed and sworn to before me this 5th day of October, 1937.

[Seal] GRACE S. WILDERS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 6, 1937. R. S. Zimmerman, Clerk, By L. B. Figg, Deputy Clerk. [15]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE—(PETITION)

State of California,
County of Los Angeles—ss.

Harry A. Mayhew, being first duly sworn, deposes and says:

I am and was on the date herein mentioned over the age of eighteen years and not a party to the above entitled action; that I personally served the Petition on file in said action by delivering to and leaving with the following named person, in the City of Los Angeles, County of Los Angeles, State of California, on the date set opposite his name, a true copy thereof, to-wit:

E. H. Mitchell, Assistant United States Attorney
October 4, 1937.

HARRY A. MAYHEW

Subscribed and sworn to before me this 4th day of October, 1937.

[Seal]

GRACE S. WILDERS

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Oct. 6, 1937. R. S. Zimmerman, Clerk, By L. B. Figg, Deputy Clerk. [16]

[Title of District Court and Cause.]

DEMURRER

Comes Now the defendant, United States of America, by Ben Harrison as United States Attorney in and for the Southern District of California, and Francis C. Whelan, Assistant United States Attorney for said District, its attorneys, and respectfully demurs to plaintiff's Petition filed herein, and for grounds for said demurrer says:

1. On June 16, 1936, there was enacted by Congress the Revenue Act of 1936 (H. R. 12395, Public No. 740, 74th Cong., Title 7, U. S. C. A. § 644 et seq.) which was signed by the President of the United States and became effective on June 22, 1936, under the provisions of which this Court is now without jurisdiction of the matters and things of which plaintiff complains, and to render judgment in favor of plaintiff and against defendant herein for that:

(a) Congress by Section 903 of said Revenue Act of 1936 has made the filing of a claim for refund by plaintiff with the Commissioner of Internal Revenue after June 22, 1936, and prior to July 1, 1937, setting forth clearly under oath all the evidence relied upon in support of said claim, a condition precedent to the maintenance of this suit in the absence of which this Court is without jurisdiction to entertain this suit.

(b) Congress by Section 904 of said Revenue [17] Act of 1936 has provided that (except as to processing taxes as defined in the Act of 1936 as hereinafter more particularly set forth) no suit or proceeding whether brought before or after June 22, 1936, for the recovery, recoupment, set-off, refund or credit, or counter-claim, of any amount paid by or collected from any person as a tax under the Agricultural Adjustment Act shall be maintained in any Court if brought before the expiration of eighteen months from the date of the filing of the claim for refund required to be filed by Section 903 of the Act, unless the Commissioner renders a decision thereon within that time, or after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant, notice of disallowance of that part of the claim to which such suit or proceeding relates.

The effect of said Section 904 (Title 7 U. S. C. A. § 646) is to deprive this Court of jurisdiction to herein determine this suit, since it affirmatively appears from the face of the Petition that no such decision by the Commissioner of Internal Revenue or no such claim has or have been made.

(c) Congress by Sections 905 and 906 (Title 7 U. S. C. A., §§ 647 and 648) of said Revenue Act of 1936 has deprived this Court of Jurisdiction to hear and determine the matters set forth in plaintiff's Petition covering the amounts paid or collected from plaintiff as processing taxes under the Agricultural Adjustment Act.

(d) Congress by Section 906 of said Revenue Act of 1936 has conferred exclusive jurisdiction to hear and determine the matters set forth in [18] plaintiff's Petition covering the amounts paid or collected as processing taxes from plaintiff under the Agricultural Adjustment Act upon a Board of Review established pursuant to subdivision (b) thereof subject to review on petition filed by plaintiff or the Commissioner of Internal Revenue as provided in subdivision (g) of said Section 906 by the Circuit Court of Appeals of the United States where the claimant resides, or by agreement of plaintiff and the Commissioner of Internal Revenue in the United States Court of Appeals for the District of Columbia.

2. Plaintiff's said Petition does not state facts sufficient to constitute a cause of action against this defendant for the following reasons:

(a) It affirmatively appears from the allegations of plaintiff's Petition that plaintiff has not complied with the provisions laid down by Congress in Sections 902, 903, 904 and 906, respectively, and each subdivision thereof, respectively, of the Revenue Act of 1936, each of which sections and subdivisions thereof is hereby by reference adopted and made part hereof as if specifically herein set forth.

(b) Plaintiff's said Petition does not state any facts which would warrant a judgment by this Court against this defendant and in favor of plaintiff.

BEN HARRISON.

United States Attorney

FRANCIS C. WHELAN

Assistant U. S. Attorney

Attorneys for

Defendant.

[Endorsed]: Filed Dec. 3, 1937. [19]

POINTS AND AUTHORITIES
IN SUPPORT OF DEMURRER.

I.

This Court is without jurisdiction to entertain this action in so far as it relates to the recovery of amounts paid as processing taxes. Section 906, Revenue Act of 1936 (hereto appended).

II.

The withdrawal from the District Courts of jurisdiction to entertain suits for recovery of amounts paid as processing taxes has deprived plaintiff of no constitutional rights.

Anniston Mfg. Co. v. Davis, 301 U. S. 337.

III.

This Court is without jurisdiction to pass upon plaintiff's claim for refund of floor stocks taxes.

A. Section 903 of the Revenue Act provides that unless certain procedural steps are taken by claimant, no refund of amounts paid as taxes shall be allowed and no suit shall be brought or maintained for recovery of any amount paid as a tax.

B. The requirements have not been complied with by plaintiff, and its suit is premature.

C. Conditions precedent to the right to sue the United States are validly imposed.

Anniston Mfg. Co. v. Davis, *supra*.

D. Compliance with conditions precedent must be alleged.

Arnson v. Murphy, 115 U. S. 579, 584, 586.

1. Compliance with conditions precedent of Sections 903 and 904 of the Revenue Act have not been alleged.

2. Elements required by Section 902 of the Act have not been alleged.

[Endorsed]: Filed Dec. 3, 1937. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [20]

[Title of District Court and Cause.]

AMENDMENT TO DEMURRER.

Comes now the defendant United States of America, by Ben Harrison, United States Attorney for the Southern District of California, and Francis C. Whelan, Assistant United States Attorney for the Southern District of California, and respectfully moves the following amendment to defendant's demurrer already on file, on the following grounds:

3. That it does not appear from the bill of complaint on file herein that a valid assignment has been made of the subject matter of the claim alleged in said bill by the Pacific Goodrich Rubber Company to complainant

herein, as required by Section 203, Title 31 U. S. Code; and that it affirmatively appears from the face of said bill of complaint that plaintiff does not rely upon a valid assignment of the claim alleged in plaintiff's bill of complaint as required by said Title 31, Section 203 U. S. Code; and that plaintiff's bill of complaint does not state a cause of action against this defendant for such reason.

Wherefore, defendant prays that plaintiff's bill of complaint be dismissed for the grounds set forth in defendant's demurrer already on file and in this amendment to demurrer.

Respectfully submitted,

BEN HARRISON,

United States Attorney,

FRANCIS C. WHELAN,

Assistant U. S. Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Apr. 6, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [21]

[Title of District Court and Cause.]

AMENDMENT TO PETITION

Pursuant to court Order dated May 21, 1938, plaintiff The B. F. Goodrich Company, a corporation, amends its petition on file herein by adding to paragraph III at the end thereof the following allegation:

In addition to the foregoing assignment and as a supplement thereof, there was executed by Pacific Goodrich Rubber Company, on the 14th day of August, 1935, a further document assigning unto The B. F. Goodrich Company all the rights, claims and choses in action of every nature and description which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or should later accrue, all as shown by a copy of said document, a full, true and correct copy of which hereinafter follows, and is hereby referred to and made a part of the amended petition:

"For value received, the undersigned, Pacific Goodrich Rubber Company, does hereby sell, assign and transfer unto The B. F. Goodrich Company, all claims, demands, choses in action or cause or causes of action of whatsoever kind and nature which it has or which may later accrue against all persons whomsoever, particularly its claim for refund of excise tax illegally paid to the United States Government

from and after April 17, 1934, in the sum of \$16,450.39, or any one sum finally found [22] to be due, together with interest thereon.

The assignor does by these presents, hereby nominate, constitute and appoint the said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of the undersigned, to claim, demand payment and/or collect all such claims and amounts and particularly, said claim for excise tax illegally paid to the United States Government, and otherwise to prosecute any and all proceedings at law or in equity therefor and to take such other action as may be necessary or appropriate to settle, compromise and/or collect said claim or claims, and further, to give effectual discharge of said claim or claims.

In Witness Whereof, the undersigned has hereunto attached its hand and seal this the 14th day of August, 1935.

PACIFIC GOODRICH RUBBER
COMPANY,

(Seal)

By J. D. TEW,

President.

By S. M. JETT,

Secretary.

F. C. LESLIE

F. M. SEIFERT

State of Ohio,
County of Summit—ss.

Before me, a Notary Public in and for said County, personally appeared J. D. Tew, President, and S. M. Jett, Secretary of the Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said the Pacific Goodrich Rubber Company.

In Testimony Whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio, this 14th day of August, 1935.

ALBERTA M. TEWERS,

Notary Public.

My Commission expires Dec. 15, 1935."

(Seal) [23]

That in all other particulars said petition shall be and remain in the form as on file herein.

Dated: May 21st, 1938.

THE B. F. GOODRICH COMPANY,
By: ANDREWS, BLANCHE & KLINE
and EUGENE H. BLANCHE,
Attorneys for Plaintiff.

[Endorsed]: Filed May 21, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy. [24]

[Title of District Court and Cause.]

ORDER

For good cause shown, It Is Hereby Ordered that the petition on file in the above entitled action shall be amended in the particulars as set forth in the hereunto attached Amendment to Petition.

Dated: May 21, 1938.

WM. P. JAMES,
Judge.

[Endorsed]: Filed May 21, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy. [25]

[Title of District Court and Cause.]

**SECOND
AMENDMENT TO DEMURRER**

Comes Now the defendant, United States of America, by its attorneys Ben Harrison, United States Attorney, and Francis C. Whelan, Asst. United States Attorney, and moves this amendment to its demurrer now on file herein.

I.

Defendant hereby demurs to plaintiff's complaint, as amended, upon the grounds and reasons heretofore set forth in defendant's Demurrer, as already amended on file herein, and by reference incorporates all of the same herein.

BEN HARRISON,
United States Attorney.

FRANCIS C. WHELAN,
Asst. United States Attorney,
Attorneys for defendant.

Received copy of above document. Andrews
Blanche & Kline. By H. A. Mayhew.

[Endorsed]: Filed Aug. 1, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [26]

[Title of District Court and Cause.]

**NOTICE OF MOTION FOR ORDER
SUSTAINING DEMURRER.**

To: The B. F. Goodrich Company, a corporation;
and

To: Andrews, Blanche & Kline and Eugene H.
Blanche, its attorneys:

You, and each of you, will please take notice that the defendant United States of America will move the above entitled court on the 3rd day of October, 1928, at 10 o'clock A. M., before the Honorable Paul J. McCormick, United States District Judge, in Room 588 Pacific Electric Building, Los Angeles, California, for its order sustaining defendant's Demurrer to plaintiff's Bill of Complaint herein.

Dated: August 8, 1938.

UNITED STATES OF AMERICA,

By BEN HARRISON,

United States Attorney,

FRANCIS C. WHELAN,

Asst. United States Attorney.

[Endorsed]: Filed Aug. 9, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [27]

At a stated term, to-wit: The September Term, A. D. 1938, of the District Court of the United States of America, within and for the Central

Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of October in the year of our Lord one thousand nine hundred and thirty-eight.

Present:

The Honorable: Paul J. McCormick, District Judge.

[Title of Cause.]

This cause coming on for hearing on demurrer; F. C. Whelan, Assistant U. S. Attorney, appearing for the Government; F. C. Leslie, Esq., appearing for the plaintiff:

Attorney Whelan makes a statement in support of the said demurrer, and Attorney Leslie makes a statement in opposition.

It is, thereupon, ordered that the demurrer be, and it is, overruled, and thirty (30) days are allowed in which to answer. [28]

[Title of District Court and Cause.]

ANSWER

Comes now defendant, United States of America, and for answer to plaintiff's petition, as amended, denies, admits and alleges as follows:

First Answer and Defense.

I.

Answering paragraph III of said petition as amended this defendant does not have sufficient

information or belief to enable it to answer the allegations of said paragraph and therefore, basing its denial upon that ground, denies each and every allegation of said paragraph III as amended.

II.

Answering paragraph V of said petition this answering defendant denies that this is an action for recovery of a manufacturer's excise tax on rubber tires or casings erroneously or illegally collected from the plaintiff by the defendant, and alleges that this action is in fact an action for the recovery of floor stock taxes collected from the plaintiff by the defendant under the provisions of the Agricultural Adjustment Act, (Act of May 12, 1933; Title 7 U. S. C. Sec. 616).

III.

Answering the allegations of paragraph VI of said petition, this answering defendant denies that plaintiff was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the [29] Revenue Act of 1932 by deducting from the weight of said tires the weight of processed cotton in said tires unless said cotton had been processed after August 1, 1933.

Further answering the allegations of said paragraph VI this defendant alleges that under the provisions of Title 7 U. S. C. Sec 609, Act of May 12, 1933, commonly known as the Agricultural Adjustment Act, it was provided that upon any article upon which a manufacturer's sale tax is levied

under the authority of Chapter 20 of Title 26, and which manufacturer's sales tax is computed on the basis of weight, such manufacturer's sales tax shall be computed on the basis of the weight of said mentioned article less the weight of the processed cotton therein on which a processing tax has been paid; this defendant further alleges that neither plaintiff nor plaintiff's assignor paid any processing tax upon the cotton referred to in plaintiff's complaint and defendant alleges that any sums paid under the Agricultural Adjustment Act respecting said cotton by plaintiff or plaintiff's assignor were paid as floor stock taxes and that there is no provision in said Agricultural Adjustment Act or otherwise allowing for a deduction from any amounts due as tax under the authority of Chapter 20 of Title 26 United States Code, on account of the payment of any floor stock taxes paid under the Agricultural Adjustment Act.

IV.

Answering paragraph VII of said petition this defendant denies that this defendant and/or the Collector of Internal Revenue erroneously and/or illegally demanded payment by plaintiff of any sum or sums, and denies that said defendant and/or said Collector of Internal Revenue erroneously collected from plaintiff any sum or sums; and denies that a processing tax within the meaning of Title 7, U. S. C. Sec. 609 had been paid upon said cotton referred to in said paragraph VII. [30]

V.

Answering paragraph XI of said petition this defendant does not have sufficient information or belief to enable it to answer the allegations of said paragraph as to the amount of tire fabric, thread and/or other materials processed wholly or in chief value from cotton and held by plaintiff for sale on August 1, 1933; therefore, basing its denial upon that ground defendant denies each and every allegation pertaining to the amount of such materials held for sale or other disposition by plaintiff on August 1, 1933; further answering the allegations of said paragraph this defendant denies that any tax levied and/or collected against or from plaintiff under the provisions of the Revenue Act of June 6, 1932, Chapter 209, Section 202; 47 Stat. 261, as modified by the Act of May 12, 1933, Chapter 25; Section 9(a); 48 Stat. 35, Title 7 U. S. C. 609(a), was erroneously and/or illegally levied and/or collected.

VI.

Answering the allegations of paragraph XII of said petition, this answering defendant does not have sufficient information or belief to enable it to answer the allegations of said paragraph not hereinbefore admitted and therefore, basing its denial on that ground, denies each and every allegation of said paragraph not hereinbefore admitted.

VII.

Answering paragraph XIII of said petition this defendant denies that plaintiff filed with the Col-

lector of Internal Revenue therein referred to, for the periods therein referred to, its manufacturer's excise tax returns in accordance with the law and/or regulations of the Secretary of the Treasury; and this defendant denies that the alleged assessment assessed against plaintiff was erroneously and/or illegally made.

VIII.

Answering the allegations of paragraph XVI, this answering de- [31] fendant does not have sufficient information or belief to enable it to answer the allegations of said paragraph and therefore, basing its denial upon that ground, denies each and every allegation of said paragraph.

IX.

Answering the allegations of paragraph XVII of said petition, this defendant denies each and every allegation thereof.

X.

Answering the allegations of paragraph XVIII of said petition, this defendant denies each and every allegation thereof, upon the ground that it does not have sufficient information or belief to enable it to answer the same.

Second Answer and Defense.

For further and affirmative answer and defense, this defendant alleges as follows:

I.

Defendant alleges that this action is in fact one for the recovery of floor stock taxes alleged to have

been levied by the defendant under the provisions of Title 7, U. S. C. Sec. 616, Act of May 12, 1933, Chap. 25, Title 1, Sec. 16, upon certain stocks of processed cotton held for sale or other disposition by Pacific Goodrich Rubber Company, a corporation, on August 1, 1933; that said Act has been held unconstitutional and invalid and that certain procedural steps have been enacted by the Congress of the United States regarding the refund of any moneys paid as taxes under said unconstitutional act, which said act is commonly known as the Agricultural Adjustment Act.

II.

That it is provided by the provisions of the Revenue Act of 1936, Chap. 690, for the procedure required to be taken for refund of any moneys collected under said Agricultural Adjustment Acts that under the provisions of said Revenue Act, Title 7, U. S. C. Sec. 645, it is provided that no refund of any amount paid by or collected from any [32] person as taxes under said Agricultural Adjustment Act shall be made or allowed unless after June 22, 1936, and prior to July 1, 1937, a claim for refund has been filed by said person in accordance with regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. It is further provided by Title 7 U. S. C. Sec. 646, that no suit or proceeding shall be brought or maintained in any court for the recovery of any moneys paid under said Agricultural Adjustment Act before the ex-

piration of eighteen (18) months from the date of filing a claim therefor under Section 645 of Title 7, U. S. C., unless the Commissioner renders a decision thereon within that time or after the expiration of two years from the date of mailing to claimant by the Commissioner a notice of disallowance of that part of the claim to which said suit or proceeding relates.

It is further provided by Section 644 of Title 7, U. S. C. that no refund shall be made or allowed of any amount paid under the provisions of the Agricultural Adjustment Act unless the claimant establishes to the satisfaction of said Commissioner of Internal Revenue that the claimant bore the burden of such amount and has not been relieved thereof, nor reimbursed therefor nor shifted such burden directly or indirectly.

III.

That neither plaintiff nor its alleged assignor herein have filed a claim for refund of said floor stock taxes within the time prescribed by law as aforesaid; that the provisions of said Revenue Act of 1936 relative to the time for filing suit for refund of floor stock taxes have not been complied with herein. Further, this defendant is informed and believes, and therefore alleges, that neither plaintiff nor plaintiff's assignor has borne the burden of such amount now sought to be recovered as required by the aforesaid provisions of the law relating to refunds of moneys paid under the Agricultural Adjustment Act. [33].

This defendant is informed and believes, and therefore alleges that this action is claimed to have been brought under the provisions of the Revenue Act of 1932 in order to evade the requirements of the law relating to the maintenance of suits for recovery of moneys paid under the Agricultural Adjustment Act as set forth in the Revenue Act of 1936.

IV.

This defendant alleges that any deduction attempted to be claimed by plaintiff from amounts taxable under the Revenue Act of 1932 by virtue of the provisions of the said Agricultural Adjustment Act are invalid for the reason that said Agricultural Adjustment Act as to the payment or collection of alleged taxes thereunder has been held to be unconstitutional and null and void and of no effect.

Wherefore, defendant prays that plaintiff take nothing by its complaint and that defendant have its costs of suit and such other and further relief as to the court may seem just and equitable.

BEN HARRISON,

United States Attorney.

FRANCIS C. WHELAN,

Assistant United States

Attorney.

Attorneys for United States
of America.

[Endorsed]: Filed Feb. 3, 1939. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy. [34]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL.

United States of America,

Southern District of California—ss.

Frances E. Barragar, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 376 Pacific Elec. Bldg., Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on Feb. 3, 1939 she deposited in the United States Mails in a mail depository at Union and "F" Streets, San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Answer addressed to Andrews, Blanche & Kline, Attorneys at Law, Union Oil Building, Los Angeles, California, at which place there is a delivery service by United States Mail from said post office.

FRANCES E. BARRAGER

Subscribed and Sworn to before me, this 3d day of February, 1939.

R. S. ZIMMERMAN,

Clerk, U. S. District Court,
Southern District of
California.

By **FRANCIS E. CROSS,**

(Court Seal) Deputy.

[Ende sed]: Filed Feb. 3, 1939. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk. [35]

[Title of District Court and Cause.]

FIRST AMENDED PETITION

(Action for Money had and Received—For
Recovery of Taxes Erroneously Collected)

Comes now plaintiff, The B. F. Goodrich Company, a corporation, and for its cause of action alleges:

I.

This action is brought against the United States of America as defendant for the reason that the person, namely, John P. Carter, who was Collector of Internal Revenue at Los Angeles, California, for the Sixth District of California, at the time of payment under protest of the amounts for the recovery of which this action is brought, died prior to the commencement of this action and on or about the 24th day of April, 1935.

II.

Plaintiff now is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York; that it is qualified to do business in the State of California, and has its principal office and place of business at Akron, Ohio, with an office in Los Angeles, California.

That defendant herein, the United States of America, now is and at all times mentioned herein was a body politic. [36]

III.

That on June 30, 1934, and at all times prior thereto and subsequent thereto, plaintiff was the sole shareholder of Pacific Goodrich Rubber Company and the sole owner of all of the issued and outstanding capital stock of Pacific Goodrich Rubber Company, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and that at no time prior to said date or thereon or at any time subsequent thereto were any of the shares of the capital stock of said Pacific Goodrich Rubber Company subscribed for but unissued.

That on said 30th day of June, 1934, plaintiff, as the sole shareholder of Pacific Goodrich Rubber Company and as the sole owner of all of the issued and outstanding shares of the capital stock of said Pacific Goodrich Rubber Company, became by operation of law, pursuant to a distribution in kind to it by Pacific Goodrich Rubber Company, the sole owner of and vested with the title to all the rights, claims and choses in action of every nature and description, which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or to become due or payable.

That as physical evidence, affirmative proof and in confirmation of the above and foregoing, an assignment was executed by Pacific Goodrich Rubber Company and delivered by it to plaintiff, all on or about June 30, 1934; that by the terms and pro-

visions of said assignment all of the assets above described, mentioned or referred to, were sold, transferred, assigned, and set over to plaintiff, all as is shown by said assignment, a full, true and correct copy of said assignment hereafter follows, is hereby referred to and made a part of this petition: [37]

“ASSIGNMENT

“Know All Men by these Presents that Pacific Goodrich Rubber Company, a corporation duly organized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

“To have and to hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

“Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

“And said Pacific Goodrich Rubber Company does hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

“In witness whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal to be affixed hereto by its President and

Secretary as of the 30th day of June, 1934.

**PACIFIC GOODRICH RUBBER
COMPANY**

By **J. D. TEW**
President"

"Attest:

S. M. JETT
Secretary"

In addition to the foregoing assignment and as a supplement thereof, there was executed by Pacific Goodrich Rubber Company, on the 14th day of August, 1935, a further document assigning unto The B. F. Goodrich Company all the rights, claims and choses in [38] action of every nature and description which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or should later accrue, all as shown by said document, a full, true and correct copy of which hereinafter follows, and is hereby referred to and made a part of this First Amended Petition:

"For value received, the undersigned, Pacific Goodrich Rubber Company, does hereby sell, assign and transfer unto The B. F. Goodrich Company, all claims, demands, choses in action or cause or causes of action of whatsoever kind and nature which it has or which may later accrue against all persons whomsoever, particularly its claim for refund of excise tax ille-

gally paid to the United States Government from and after April 17, 1934, in the sum of \$16,450.39, or any one sum finally found to be due, together with interest thereon.

"The assignor does by these presents, hereby nominate, constitute and appoint the said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of the undersigned, to claim, demand payment and/or collect all such claims and amounts and particularly, such claim for excise tax illegally paid to the United States Government, and otherwise to prosecute any and all proceedings at law or in equity therefor and to take such other action as may be necessary or appropriate to settle, compromise and/or collect said claim or claims, and further, to give effectual discharge of said claim or claims.

"In witness whereof, the undersigned has hereunto attached its hand and seal this the 14th day of August, 1935.

(Seal) **PACIFIC GOODRICH RUBBER
COMPANY**

By J. D. TEW

President

By S. M. JETT

Secretary

F. C. LESLIE

F. M. SEIFERT

"State of Ohio,
County of Summit—ss.

"Before me, a Notary Public in and for said County, personally appeared J. D. Tew, President, and S. M. Jett, Secretary of the Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal [39] affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said The Pacific Goodrich Rubber Company.

"In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio, this 14th day of August, 1935.

(Seal)

ALBERTA M. TEWERS

Notary Public

My Commission expires Dec. 15, 1935."

IV.

That during his lifetime and during the time when the amounts herein paid were sought to be recovered, John P. Carter was the duly appointed, qualified and acting Collector of Internal Revenue for the Sixth District of California.

V.

That this is an action arising under the laws of the United States levying and providing for the collection of internal revenue, and more particularly under the Act of June 6, 1932, Chapter 209, Section 202, 47 Stat. 261, as modified by the Act of August 12, 1933, Chapter 25, Section 9 (a), 48 Stat. 35, and is for the recovery of a manufacturer's excise tax on rubber tires or casings erroneously and illegally collected from the plaintiff by the defendant.

VI.

That under Section 16 of the Agricultural Adjustment Act (Public No. 10, 73d Congress), plaintiff's predecessor in interest, Pacific Goodrich Rubber Company, was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933, (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture), [40] in an amount equivalent to the tax which would have been paid on said cotton had it actually been purchased after August 1, 1933, i.e., \$0.044184 per pound; that under Section 9(a) of said Agricultural Adjustment Act, plaintiff's said predecessor in interest was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the Revenue Act of 1932 by deducting from the weight of said tires the weight of processed cotton in said tires upon which a processing tax had been paid

under Section 9 (a) or Section 16 (a) of the Agricultural Adjustment Act.

VII.

That said defendant and said Collector of Internal Revenue refused to permit plaintiff's said predecessor in interest to take credit against excise tax on articles processed wholly or in chief value from cotton in its inventory on August 1, 1933, despite the fact that the processing tax had theretofore been duly paid by the plaintiff's said predecessor in interest upon cotton contained in such articles under Section 16 (a) of the Agricultural Adjustment Act, and said defendant and said Collector of Internal Revenue erroneously and illegally demanded payment by plaintiff's said predecessor in interest of \$..... with interest of \$....., and said defendant and said Collector of Internal Revenue erroneously collected from plaintiff's said predecessor in interest, and the same was turned over to defendant, the sum of \$15,880.64 on or about April 18, 1934, and \$569.75 on or about July 27, 1934.

VIII.

That plaintiff, on or about August, 1935, duly filed with Nat Rogan, successor of said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, in Los Angeles, its Claim for Refund of said tax and interest in the aggregate sum of \$16,450.39, paid by plaintiff's [41] said predecessor in interest on April 17, 1934, and July 27, 1934, as set out

above, together with interest thereon from the date of such erroneous payment to the date of the allowance of refund, and that the grounds set forth in said Claim for Refund were as follows:

“Under the provisions of this section, (9. (a) of the Agricultural Adjustment Act), the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that the taxpayer is not entitled to the credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitled taxpayer to a credit of the amount of tax and interest above claimed.”

That a full, true and correct copy of said Claim hereinafter follows, is hereby referred to and by this reference is incorporated herein and made a part of this First Amended Petition. [42]

Form 843

Treasury Department
Internal Revenue Service
Revised June, 1930

CLAIM

To be filed with the Collector where assessment was
made or tax paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse side.

- ☒ Refund of tax illegally collected.
- ☐ Refund of amount paid for stamps unused, or
used in error or excess.
- ☐ Abatement of tax assessed (not applicable to
estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps The B. F.
Goodrich Company

Business Address 5400 E. Ninth Street, Los Angeles,
California

Residence

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed Los
Angeles, California
2. Period (if for income tax, make separate form

for each taxable year) from _____, 19____
to _____, 19_____

3. Character of assessment or tax excise tax
4. Amount of assessment, \$16,450.39; dates of payment April 17, July 27, 1934
5. Date stamps were purchased from the Government _____
6. Amount to be refunded—\$16,450.39 plus
7. Amount to be abated (not applicable to income or estate taxes) \$ interest
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H.R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1922 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a

proper construction of the Section 9 of the Agricultural Adjustment Act entitled taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [43]

(Signed) THE B. F. GOODRICH
COMPANY

By

Sworn to and subscribed before me this
day of, 193.....

.....
(Signature of officer administering oath)

.....
(Title)

(See Instructions on reverse side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

Collector of Internal Revenue

(District)

Committee on Claims

Amount claimed \$

Amount allowed \$

Amount rejected \$

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [44]

That said Claim was rejected by the Commissioner of Internal Revenue under date of May 22, 1936, along with an amended claim, filed as hereinafter stated.

IX.

That plaintiff, on or about April 10, 1936, duly filed with Nat Rogan, the successor to said deceased Collector of Internal Revenue, as Collector of Internal Revenue for the Sixth District of California, its amended Claim for Refund of said tax and interest, in the aggregate sum of \$16,450.39, paid by plaintiff's said predecessor in interest as

above set forth, and the grounds set forth in said Amended Claim were as follows:

“During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the Sixth District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not [45] apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of the said Act. The taxpayer did not include

the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitled the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words 'processing tax' as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that 'processing taxes' as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid."

That a full, true and correct copy of said Amended Claim hereinafter follows, is hereby referred to and is by reference incorporated herein and made a part hereof. [46]

Form 843

**Treasury Department
Internal Revenue Service
Revised June, 1930**

**AMENDED CLAIM TO BE FILED WITH THE
COLLECTOR WHERE ASSESSMENT WAS
MADE OR TAX PAID.**

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- Refund of Tax Illegally Collected.
- Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company.

Business address—5400 E. Ninth Street, Los
Angeles, Calif.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—
Los Angeles, California.
2. Period (if for income tax, make separate form

for each taxable year) from.....19....., to.....
19.....

3. Character of assessment or tax—Excise tax.

4. Amount of assessment, \$16,450.39; dates of payment—April 17, July 27, 1934.

5. Date stamps were purchased from the Government—

6. Amount to be refunded—\$16,450.39 plus interest.

7. Amount to be abated (not applicable to income or estate taxes)—\$

8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the 6th District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933 taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight

of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires, upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitled the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit

granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to ask, demand, or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. [47]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the

following facts as to the purchase of stamps:
[Form not filled in]

Collector of Internal Revenue

(District)

Amount claimed\$.....
Amount allowed\$.....
Amount rejected\$.....

Committee on Claims

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administra-

tor, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation. [48]

X.

That on or about May 25, 1936, plaintiff received from the Commissioner of Internal Revenue a notice dated May 22, 1936, that the said Amended Claim for Refund of said additional assessment and interest was rejected by the Commissioner of Internal Revenue on May 22, 1936, and neither said amount collected from plaintiff's said predecessor in interest nor any part thereof has been repaid to plaintiff's said predecessor in interest or to plaintiff.

XI.

That on August 1, 1933, the plaintiff's said predecessor in interest held for sale or other disposition articles processed wholly or in chief value from cotton, to-wit, tire fabric, thread and other materials having a total cotton content of 782,474

pounds; that plaintiff's said predecessor in interest, according to law and the Regulations of the Secretary of the Treasury, promulgated in pursuance to said law, duly prepared and filed with said John P. Carter, Collector of Internal Revenue, its return and amended return showing said cotton content in detail, and paid to said Collector of Internal Revenue for defendant, and the same was paid and turned over to defendant by said Collector of Internal Revenue, a tax thereon at the rate of \$0.044184 per pound, which was the rate fixed by the Secretary of Agriculture in accordance with the provisions of the Agricultural Adjustment Act; that plaintiff's said predecessor in interest paid to said Collector of Internal Revenue for defendant and the same was paid and turned over to defendant under said return, the sum of \$34,648.08 in four installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,662.03

That despite the fact that the tax levied and collected was [49] erroneously and illegally levied and collected, no part of the above named tax has been received by, refunded or credited to the plaintiff or to plaintiff's said predecessor in interest.

XII.

That from August 1st through the 15th day of

September, 1933, plaintiff's said predecessor in interest manufactured and sold tires which contained 705,806 pounds of the above mentioned 782,474 pounds of articles processed wholly or in part from cotton and which was in the inventory of plaintiff's said predecessor in interest, and, on August 1, 1933, being held for sale or other disposition by said plaintiff's predecessor in interest and upon which a tax at the rate of \$0.044184 per pound had been paid as above set forth.

XIII.

That for the months of August, September, October, November and December, 1933, plaintiff's said predecessor in interest filed with said John P. Carter, Collector of Internal Revenue, its manufacturers' excise tax returns in accordance with the law and regulations of the Secretary of the Treasury, and paid to said Collector of Internal Revenue for and the same was paid and turned over to defendant, the taxes disclosed by said returns to be due and owing on the tires sold during said months, under the provisions of Section 602 of the Revenue Act of 1932; that said plaintiff's predecessor in interest computed the aforesaid taxes by deducting from the weight of the tires so sold the weight of the articles processed wholly or in chief value from cotton, contained therein, including in said deduction the above described 757,260 pounds of articles processed wholly or in chief value from cotton

upon which a tax had theretofore been paid at the rate of \$0.044184 per pound as hereinbefore alleged. That on or about April 10, 1934, the defendant and the said Collector of Internal Revenue for defendant assessed an additional manu- [50] facturer's excise tax against plaintiff's said predecessor in interest for the months of November and December, 1933, and in the sum of \$15,880.64, with interest in the sum of \$569.75, and that said additional assessment erroneously and illegally included an additional excise tax at the rate of $2\frac{1}{4}\text{¢}$ per pound upon said 705,806 pounds of articles processed wholly or in chief value from cotton, which amount plaintiff's said predecessor in interest had deducted from the weight of tires sold by it during the months of August and September, 1933, as above alleged.

XIV.

Upon demand by defendant and said John P. Carter, Collector of Internal Revenue, plaintiff's said predecessor in interest on April 17, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, the sum of \$15,880.64, and on July 27, 1934, paid to said Collector of Internal Revenue for, and the same was paid and turned over to defendant, interest according to the said demand in the sum of \$569.75; that said payments were made by plaintiff's said predecessor in interest under protest that such assessment was erroneous and illegal and was

made solely to avoid interest and penalty, of which fact the defendant was duly advised at the time of said payments.

XV.

That at the time said additional tax was assessed, the defendant and the said John P. Carter, Collector of Internal Revenue, for convenience in arriving at the additional tax and interest which defendant and said Collector of Internal Revenue claimed to be due from plaintiff's said predecessor in interest to defendant, determined that such assessment should be levied for the months of November and December; that plaintiff's said predecessor in interest did not object to this action if assessment were to be made, but did object to any additional assessment being made. [51]

XVI.

That plaintiff's said predecessor in interest did not and has not included any of the tax which plaintiff herein seeks to recover in the price of the article with respect to which the said tax was imposed nor did plaintiff's said predecessor in interest collect the amount of the said tax or any thereof from the vendees of said article.

XVII.

That by reason of the premises, defendant became and is indebted to plaintiff in the sum of \$16,450.39, together with interest, after allowing all just credits and offsets.

XVIII.

That plaintiff is and always has been the sole owner of the claims herein referred to since June 30, 1934, and has not assigned, transferred or otherwise disposed of said claims or any thereof or any part thereof or any interest therein.

Wherefore, the plaintiff prays judgment against the defendant, United States of America, in the sum of \$16,450.39, with interest thereon at the rate of six per cent (6%) per annum, upon the sum of \$15,880.64 from April 18, 1934, and interest at said rate upon the sum of \$569.75 from July 27, 1934.

THE B. F. GOODRICH COMPANY

By **EUGENE H. BLANCHE**

Its Attorney [52]

State of California,
County of Los Angeles—ss.

J. C. Herbert, being by me first duly sworn, deposes and says: That he is Assistant Secretary of The B. F. Goodrich Company, the petitioner in the above entitled action; that he makes this affidavit for and on behalf of said The B. F. Goodrich Company; that he has read the foregoing First Amended Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

J. C. HERBERT

Subscribed and sworn to before me this 2nd day of February, 1940.

(Seal)

ETHEL HICKEY

Notary Public in and for said County of
Los Angeles, State of California

[Endorsed]: Filed Feb. 5, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy. [53]

[Title of District Court and Cause.]

STIPULATION

(1—As to filing First Amended Petition by Plaintiff; 2—That Answer of Defendant to Petition as amended be Answer to First Amended Petition)

It is hereby stipulated by and between the above named plaintiff, The B. F. Goodrich Company, and the above named defendant, United States of America, by and through their respective counsel, as follows:

(a) That the petition and the amendment to the petition on file in the above entitled action may be amended in the particulars as set forth in plaintiff's First Amended Petition presented herewith;

(b) That defendant's Answer heretofore filed herein to plaintiff's Petition as amended shall in all particulars be deemed to be and shall be an Answer to plaintiff's First Amended Petition in all particulars and with the same force and effect and

to the same extent as though said Answer was specific and particular answer to said First Amended Petition.

Dated: February 2, 1940.

EUGENE H. BLANCHE

Attorney for Plaintiff

BEN HARRISON,

United States Attorney

By **ARMOND MONROE JEWELL**

Assistant United States Attorney

Attorneys for Defendant

It is so ordered, this Feb. 5, 1940.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed Feb. 5, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [54]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS.

The undersigned does hereby substitute Eugene H. Blanche in the place and stead of the firm of Andrews, Blanche & Kline as its attorney in the above entitled matter.

Dated this 20th day of October, 1939.

THE B. F. GOODRICH COMPANY

By **J. C. HERBERT**

Ass't Sec'y

We hereby consent to the foregoing substitution this 2...th day of October, 1939.

ANDREWS, BLANCHE & KLINE

By L. W. ANDREWS

I hereby accept the foregoing substitution this 26th day of October, 1939.

EUGENE H. BLANCHE

[Endorsed]: Filed Feb. 10, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [55]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. The tax sought to be recovered in the above entitled action was paid to John P. Carter, the Collector of Internal Revenue, at Los Angeles, California, for the Sixth District of California. The said John P. Carter died prior the commencement of this action, namely, on or about the 24th day of April, 1935. Nat Rogan succeeded the said John P. Carter, deceased, as Collector of Internal Revenue.

for the Sixth District of California, and still holds that position.

2. The plaintiff herein is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of New York with its principal place of business at Akron, Ohio; that it is qualified to do business in the State of California and has an office at Los Angeles, California.

The defendant, United States of America now is and at all times mentioned in the First Amended Petition herein and in this stipulation was a body politic. [56]

3. That if J. C. Herbert was called as a witness and sworn in the hearing and trial of the above entitled matter, he would testify as follows:

That on June 20, 1927, Pacific Goodrich Rubber Company was incorporated under the laws of the State of Delaware.

That said corporation was dissolved on or about December 21, 1934.

That from on or about March 1, 1928 to on or about June 30, 1934, he, the said J. C. Herbert was an officer of, to wit, Secretary of said Pacific Goodrich Rubber Company, and that from on or about June 30, 1934, to December 21, 1934, he was Vice President of said corporation; that as such he had charge of the corporate books and records of said corporation.

That on June 30, 1934, 8000 shares of the capital stock of said Pacific Goodrich Rubber Company were issued and outstanding, and that none of the shares of said stock were subscribed for but unissued; that at all times on and after June 30, 1934, the number of shares of stock of said Pacific Goodrich Rubber Company which were issued and outstanding remained unchanged; that at no time on or after June, 1934, were any of said shares subscribed for but unissued; that the books, records and accounts of Pacific Goodrich Rubber Company disclosed at all times from the time of the first issuance of stock up to and including the date of its disincorporation that all stock issued by Pacific Goodrich Rubber Company was issued in the name of The B. F. Goodrich Company, a corporation, or to Trustees for its benefit as the actual owner thereof.

That he, the said J. C. Herbert, was on June 30, 1934, and ever since said date has been and now is an officer of The B. F. Goodrich Company, a corporation, to wit, the Ass't Secretary of said corporation, and as such is familiar with the assets and affairs of such Company, and that on June 30, [57] 1934, and at all times thereafter up to and including December 21, 1934, The B. F. Goodrich Company was the owner of 8,000 shares of capital stock of Pacific Goodrich Rubber Company.

That he, the said J. C. Herbert, as said officer of Pacific Goodrich Rubber Company, and as officer of The B. F. Goodrich Company, knows that the original assignment dated June 30, 1934, copy of which is particularly set forth in lines 1 to 28, inclusive, of page 3 of the First Amended Petition in the above entitled matter, was executed by Pacific Goodrich Rubber Company to and in favor of The B. F. Goodrich Company and was by said Pacific Goodrich Rubber Company delivered to the said The B. F. Goodrich Company, and that the original of the assignment, dated August 14, 1935, copy of which is set forth in lines 7 to 32 of page 4, and lines 1 to 10 of page 5, of the First Amended Petition in the above entitled action was executed by Pacific Goodrich Rubber Company to and in favor of The B. F. Goodrich Company and was delivered by Pacific Goodrich Rubber Company to the said The B. F. Goodrich Company.

That full, true and correct copies of said assignments of June 30, 1934 and of August 14, 1935 are filed herein as plaintiff's Exhibits "A" and "B" respectively; said copies having by stipulation the same force and effect as though the original assignments were so filed.

4. That if George Hubbell were called as a witness and sworn at the hearing and trial of the above entitled matter, he would testify as follows:

That he now is and at all of the times mentioned in the First Amended Petition herein was an agent and employee of Pacific Goodrich Rubber Company, to-wit, [58] the cashier and/or auditor of said Company, and that he is and at all times mentioned in said First Amended Petition, since June 30, 1934, was an officer of, to-wit, an Assistant Treasurer of The B. F. Goodrich Company.

That the books and records of said Pacific Goodrich Rubber Company show the quantity and quality of articles that Pacific Goodrich Rubber Company held for sale on August 1, 1933, which were processed wholly or in chief from cotton, to-wit, tire fabric, thread, and other materials, and the quantity and type of tires which were manufactured by Pacific Goodrich Rubber Company from said articles from August 1, 1933 to the 5th day of January, 1934, and the cotton content of the tires and the quantity of the processed cotton contained therein and the amount of cotton which was used in the manufacture of said tires which comprised articles processed from cotton on August 1, 1933, and which were held by Pacific Goodrich Rubber Company for sale or other disposition on said date and other items and matters relating to taxes paid by Pacific Goodrich Rubber Company and its dealings under all Revenue Acts and under the Agricultural Adjustment Act of the United States of

America,—which books and records were and are kept under the supervision and control of the said George Hubbell, his duties being, among others; to keep said books and records; that he, the said George Hubbell is familiar with and knows the prices at which tires were sold by Pacific Goodrich Rubber Company at all the times mentioned in said First Amended Petition herein and is familiar with and knows whether or not there was included in the price of the tires sold by Pacific Goodrich Rubber Company during the period from August 1, 1933 to the 5th day of January, 1934, any amount to cover any [59] excise tax on the processed cotton contained in the tires manufactured and sold by Pacific Goodrich Rubber Company during said period, and is familiar and knows whether the prices at which Pacific Goodrich Rubber Company sold tires during said period containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act were any greater than the prices at which during said period Pacific Goodrich Rubber Company sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, and knows whether any additional billing was made to customers and/or vendees who purchased said tires during said period after the assessment of \$15,880.64 was made against said Pacific Goodrich Rubber

Company as alleged in said First Amended Petition herein.

That on August 1, 1933, Pacific Goodrich Rubber Company held for sale or other distribution articles processed wholly or in chief value from cotton, to-wit, tire fabrics, threads, and other materials having a total cotton content of 782,474 pounds, hereinafter referred to as processed cotton; that pursuant to Section 16 of the Act of May 12, 1933, hereinafter referred to as the Agricultural Adjustment Act and the regulations of the Secretary of the Treasury established thereunder, duly prepared and filed with John P. Carter, deceased, then Collector of Internal Revenue for the Sixth District of California, its return showing the said processed cotton of 784,177 pounds, and paid to him a tax thereon at the rate of \$0.044184 per pound as duly fixed by the Secretary of Agriculture, in the total sum of \$34,648.08. Said tax was paid in four [60] installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,666.03

5. It is hereby stipulated that no portion of said tax of \$34,648.08 has been refunded to Pacific Goodrich Rubber Company or to this plaintiff.

6. That the said George Hubbell, if so called as aforesaid, would testify as follows:

During the period from August 1, 1933, through the 5th day of January, 1934, Pacific Goodrich Rubber Company manufactured and sold tires (exclusive of tax-free tires sold to the Government for export) which contained 705,806 pounds of the 782,474 pounds of processed cotton which were in Pacific Goodrich Rubber Company's inventories on August 1, 1933, being held for sale or other disposition by said Pacific Goodrich Rubber Company; that the other and remaining 76,668 pounds of processed cotton which Pacific Goodrich Rubber Company held for sale or other disposition on August 1, 1933, were manufactured and sold in rubber products other than tires, or wasted.

That pursuant to Section 602 of the Act of June 6, 1932, hereinafter referred to as the Manufacturer's Excise Tax, Pacific Goodrich Rubber Company prepared and filed excise tax returns with respect to the tires which it sold during the period from August 1, 1933, through the 5th day of January, 1934; that in preparing said returns, Pacific Goodrich Rubber Company computed the weight of the tires subject to the manufacturer's excise tax but deducted from the aforesaid gross weight 782,474 pounds, being the weight of the processed cotton contained therein and on which a tax had been paid under Section 9-a or Section 16 of the Agricultural Adjustment Act, namely 782,474 pounds of [61] of processed cotton; that, Pacific Goodrich Rubber Company reported in its manufacturer's excise tax returns for the period from August 1,

1933, through the 5th day of January, 1934, the remaining pounds in the tires sold during said periods and paid to the said John P. Carter, deceased, an excise tax of $2\frac{1}{4}$ cents per pound on such weight.

6(a). It is hereby stipulated that on ~~or~~ about the 10th day of April, 1934, the defendant assessed against Pacific Goodrich Rubber Company an additional manufacturer's excise tax in the sum of \$15,880.64 together with interest of \$569.74, and demanded that said additional tax be paid by Pacific Goodrich Rubber Company; that said assessment and demand was made upon Treasury Department Form 728, Revised November 1933; a full, true and correct copy of which is filed herein as plaintiff's Exhibit "C" and has the same force and effect as though the original thereof was so filed.

That said additional assessment included a tax of $2\frac{1}{4}$ cents per pound upon 705,806 pounds of processed cotton which Pacific Goodrich Rubber Company had deducted from the weight of the tires sold by it during the period from August 1, 1933, to the 5th day of January, 1934.

7. That said George Hubbell would further testify that the 705,806 pounds of processed cotton so assessed by the said John P. Carter, deceased, and/or the defendant, were a part of the 784,177 pounds of articles processed wholly or in chief value from cotton which Pacific Goodrich Rubber Company held for sale or other disposition on August 1, 1933, and upon which it had paid a tax of \$24.

648.08 under Section 16 of the Agricultural Adjustment Act.

8. It is further stipulated and agreed that on or about April, 1934, Pacific Goodrich Rubber Company paid to the said John P. Carter, deceased, \$15,880.64 of said additional assessment [62] and on or about July 27, 1934, paid the balance of said assessment, namely, \$569.75, representing interest on the above described \$15,880.64. That said payments were made by Pacific Goodrich Rubber Company under protest and the said John P. Carter, deceased, and the defendant were fully so advised at the time of said payments.

That the said George Hubbell, if so called as above set forth, would testify that said payments were made by Pacific Goodrich Rubber Company solely to avoid penalties and said Pacific Goodrich Rubber Company so advised the said John P. Carter, deceased, and the said defendant.

9. It is further stipulated and agreed that on or about August 31, 1935, the plaintiff herein duly filed with Nat Rogan, successor to John P. Carter, deceased, as Collector of Internal Revenue for the Sixth District of California, a claim dated August 14, 1935, for refund of said tax of \$15,880.64, plus interest amounting to \$569.75 which had been assessed and collected by the defendant from Pacific Goodrich Rubber Company, a full, true and correct copy of said claim is filed herein as plaintiff's Exhibit "D" and has the same force and effect as though the original thereof was so filed.

10. It is further stipulated and agreed that on or about April 21, 1936, plaintiff duly filed with said Nat Rogan, successor of John P. Carter, deceased, as such Collector of Internal Revenue, its amended claim for refund of said tax of \$15,880.64, plus interest of \$569.75, all of which had been assessed and collected by the defendant from Pacific Goodrich Rubber Company, a full, true and correct copy of said claim is filed herein as plaintiff's Exhibit "E" and has the same force and effect as though the original thereof was so filed. [63]

11. It is further stipulated and agreed that the Commissioner of Internal Revenue denied and disallowed both the original and amended claims for refund by written notice to the plaintiff as successor to Pacific Goodrich Rubber Company, a copy of said denial and disallowance bearing date of May 22, 1936, is filed herein as plaintiff's Exhibit "F" and has the same force and effect as though the original thereof was so filed.

12. That the said George Hubbell, if so called as aforesaid, would testify that throughout the period from August 1, 1933 to about the 10 day of April, 1934, Pacific Goodrich Rubber Company was informed and believed that, for the purpose of computing its Manufacturer's Excise Tax on tires manufactured and sold, it was entitled, under the provisions of Section 9-a of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either

under Section 9-a or Section 16 of the Agricultural Adjustment Act, and that Pacific Goodrich Rubber Company and plaintiff herein at all times prior to the 10 day of April, 1934, believed that its tax burden with respect to said tires would amount to \$0.044184 on the processed cotton contained in said tires and $2\frac{1}{4}$ cents per pound on the remaining weight of said tires; and that at no time during the period preceding the 10 day of April, 1934, did Pacific Goodrich Rubber Company or plaintiff herein contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional tax of $2\frac{1}{4}$ cents per pound on account of processed cotton contained in said tires, and on which it had paid a tax of approximately $4\frac{1}{2}$ cents per pound under Section 16 of the Agricultural Adjustment Act; and that Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of tires sold during the period from August 1, 1933 to the 5th day of January, 1934, any amount [64] to cover any excise tax on the processed cotton contained in the tires manufactured and sold during said period; and that the prices at which Pacific Goodrich Rubber Company sold said tires during said period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, and that no

additional tax was proposed against Pacific Goodrich Rubber Company until long after all tires containing cotton held for sale or other disposition on August 1, 1933, had been sold and billed to purchasers of or vendees of Pacific Goodrich Rubber Company, and that no additional billing was made to said customers and/or said vendees and no additional amount collected from said customers and/or said vendees after the assessment of the above mentioned \$15,880.64.

13. It is further stipulated and agreed that each and all of the above and foregoing stipulations with respect to which the said J. C. Herbert and/or the said George Hubbell would testify if so called as witnesses in the above matter, shall be taken with the same force and same effect and to the same extent as though the said J. C. Herbert and/or the said George Hubbell had been so sworn and so testified, all as hereinabove set forth.

Dated: February 10, 1940.

F. C. LESLIE

EUGENE H. BLANCHE

Attorneys for Plaintiff

BEN HARRISON,

United States Attorney.

By ARMOND MONROE JEWELL,

Assistant United States Attorney

Attorney for Defendant

[Endorsed]: Filed Feb. 10, 1940. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy [65]

At a stated term, to-wit: The February Term, A. D. 1940, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the 10th day of February in the year of our Lord one thousand nine hundred and forty.

Present: The Honorable Paul J. McCormick, District Judge.

[Title of Cause.]

This cause coming on for trial; Eugene H. Blanche, Esq., appearing as counsel for the plaintiff; A. M. Jewell, Assistant U. S. Attorney, appearing as counsel for the Government; A. Wahlberg, Court Reporter, being present; and F. C. Leslie, Esq., is now associated as counsel for the plaintiff herein for the purposes of this case; at 10:07 o'clock A. M. both sides answering ready, it is ordered to proceed.

Attorney Blanche makes a statement of the plaintiff's case; Attorney Leslie makes a further statement of the plaintiff's case; Attorney Jewell makes a statement of the Government's case. Attorney Blanche now presents Stipulation of Facts, which is ordered filed herein. The following exhibits are offered and admitted in evidence:

Plf's Ex. A—Copy of Assignment, dated 6/30/34,

Plf's Ex. B—Copy of Assignment, dated 8/14/35,

Plf's Ex. C—Copy of Return for Nov. & Dec. 1933,

Plf's Ex. D—Copy of Claim for Refund, dated 8/19/35,

Plf's Ex. E—Copy of Amended Claim Refund, dated 3/30/36

Plf's Ex. F—Copy of Claim for Refund, dated 8/19/35,

Plf's Ex. G—Copy of Amended Claim for Refund, Form 843,

Plf's Ex. Hl, Ha, and Hs—Three (3) Letters, Treas. Dep't to Goodrich Co.,

Plf's Ex. I—Copy of Minutes of 7/6/34 and 8/24/34,

Plf's Ex. J—Copy of Certificate of Dissolution, dated 12/21/34.

At 10:30 o'clock A. M. the plaintiff rests.

Attorney Jewell now offers the following exhibits, and the same are received in evidence:

U. S. Ex. 1—Copy of Return, dated Nov. 1933,

U. S. Ex. 2—Copy of Return, dated Dec. 1933, [66]

U. S. Ex. 3—Copy of Claim for Abatement, dated 7/7/36.

U. S. Ex. 4—Copy of Claim for Abatement, dated 5/27/36.

At 10:30 o'clock A. M. the Government rests.

Attorney Blanche makes a further statement and moves to amend Petition herein as to certain typographical errors being corrected and there being no objections thereto, it is so ordered, the Clerk now correcting same by interlineation on the original Petition herein.

The plaintiff and the Government rest.

It is ordered that the cause be submitted for decision on briefs to be filed 20 x 20 x 10 commencing February 12, 1940. [67]

[Title of District Court and Cause.]

**CONCLUSIONS OF THE COURT ON THE
MERITS OF THE ACTION.**

This is an action by the plaintiff corporation, as sole owner of the stock of, and as assignee of Pacific Goodrich Rubber Company, a corporation, to recover the sum of \$16,450.39, with interest. The demand is based upon claims for refund of taxes paid by Pacific Goodrich Rubber Company under protest, and alleged by the plaintiff to have been erroneously computed and assessed by the Commissioner of Internal Revenue under Section 602 of the Revenue Act of 1932.

The record shows the following factual situation: During the period from August 1, 1933, through September 30, 1933, the taxpayer, Pacific Goodrich Rubber Company, manufactured and sold tires which contained approximately 705,806 pounds of

cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue, a so-called "floor tax" levied by Section 16 of the Agricultural Adjustment Act, 48 Stat. 31, at the rate of .044184 per pound. In computing the excise taxes imposed by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold after August 1, 1933, taxpayer took a deduction from such excise tax as provided in Section 9 of the Agricultural Adjustment [68] Act, *supra*; in other words, the taxpayer arrived at the excise tax due under the 1932 Act by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of the processed cotton in such tires, upon which a so-called "floor tax" had been paid under Section 16, *supra*. This claimed credit or deduction was disallowed by the Bureau of Internal Revenue, and the tax authorities of the United States thereupon demanded additional manufacturer's tax under Revenue Act of 1932, and the taxpayer, Pacific Goodrich Rubber Company, in order to avoid penalties and interest, paid under protest the additional manufacturer's tax and interest in the sum of \$16,450.39. This action followed claims, both by the taxpayer and by the plaintiff, for the refund of said sum of money, with interest, which have been rejected by the Government.

The position of the United States is substantially that, despite the fact that the taxpayer had paid the tax on the cotton in the tires under provisions of the

Agricultural Adjustment Act, it was not entitled to refund of the \$16,450.39.

The aforesaid section of the Revenue Act of 1932 imposed a tax upon tires, wholly or in part of rubber, of $2\frac{1}{4}\%$ a pound on total weight of sales by manufacturers.

Section 9(b), *supra*, provided that "upon any article upon which a manufacturer's sales tax is levied under the authority of the Revenue Act of 1932, and which manufacturer's sales tax is computed on the basis of weight, such manufacturer's sales tax shall be computed on the basis of weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid." [69]

Section 16, *supra*, titled "floor stocks" imposes a tax equal in amount to the processing tax imposed by other parts of Title I of the Agricultural Adjustment Act.

The primary question for decision under the stipulation of facts filed herein, and the further record evidence received at the hearing in court on February 10, 1940, is whether plaintiff's predecessor and assignor, a tire manufacturer, was entitled in the computation of its sales tax on tires under the Revenue Act of 1932 to deduct from the weight of the taxed tires the weight of the taxed cotton therein upon which it had paid the tax specified in Section 16 of Title I of the Agricultural Adjustment Act.

Secondly, if under the facts of this case, such deduction or credit is proper and allowable to the tax-

payer company under the Revenue Act of 1932, is the plaintiff in this action, who was not actually the taxpayer, entitled under the record to require a refund to it of such overpayment?

Plaintiff contends that the tax credit or refund sued for in this action is neither a "floor stock tax" nor a "processing tax," but, rather, an "additional manufacturer's excise tax;" but assuming that such is the case, and on demurrer we substantially held that it was, yet, in order for the plaintiff to recover in this action it must show that Section 9 of the Triple A Act authorizes the credit demanded.

If the section is read and considered literally, its provisions are restricted to paid "processing taxes" as such are expressly defined in the Agricultural Adjustment Act. It is undeniable that the so-called "floor stock" tax provided for in the Agricultural Adjustment Act is not within the literal terms of Section 9. Indeed, the tax [70] levied under Section 16 is not defined in the Act; but the established rule that where the words of a statute are clear there is no room for construction, is not to be applied where the literal meaning produces an unreasonable result—one that is "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Assn.*, 310 U. S. 534.

In my opinion, an examination of Title I of the Agricultural Adjustment Act with the aid and in the light of the correlative legislative history and material which led up to this remedial law, clearly

shows the error and injustice of the contention that the deduction computation provided in Section 9 is inapplicable to the unnamed tax imposed by Section 16, or that deductions under Section 9 should be confined to specifically defined "processing" taxes according to the letter of the law. To so restrict the application of Section 9a would utterly destroy the chief factor present in the legislative mind in making omnibus provisions to prevent tax discrimination between tire manufacturers without any real differentiation of business activity in or use of fabricated commodities. See *United States v. Dickerson*, 310 U. S. 554.

The intent and purpose of Congress must be ascertained as of the time of enacting the Agricultural Adjustment Act and not by looking backward and taking into consideration the untoward consequences that ensued from the decision of the Supreme Court in *United States v. Butler*, 297 U. S. 1.

To construe the refund or credit provisions of the Triple A so as to include the so-called "floor stock" taxes as well as the statutorily defined "processing" taxes instead of adding "something entirely new to the meaning [71] of the word 'processing', as it is used" in the statutes, as argued by the Government, merely sheds light upon what appears from reading the whole of Title I to have been the painstaking purpose of Congress—namely, the prevention of discrimination and double taxation.

We have been unable to find from an analysis of the applicable tax statutes any reason why the Con-

gress should desire to relieve the manufacturers of the burden of double taxation where one tax is a processing tax and the other is a sales tax and not to relieve the same manufacturers of double taxation when one of the taxes is a so-called "floor stock tax" and the other is a sales tax; therefore, the danger of going beyond the literal interpretation of a taxing statute, adverted to in *United States v. American Trucking Assn.*, supra, is not present in the consideration of the tax legislation pertinent to this action.

The Government substantially contends that the decision of the United States Supreme Court in *United States v. Butler*, supra, declaring certain portions of the Agricultural Adjustment Act to have been unconstitutional, operates to nullify all refund rights of taxpayers which arise by virtue of any feature of the taxing scheme invalidated. We are not impressed with this claim—it fails to evaluate the effect of Section 14 of Title I of the Act, which is as follows:

"If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance or commodity is held invalid, the validity of the remainder of this title and the applicability thereof to other persons, circumstances or commodities shall not be affected thereby."

Moreover, while the claim which is the basis of this action [72] has relation to the levy of the so-called

"floor stock" taxes provided for in Title I of the Triple A, the refund which is here sought is for an erroneously paid "manufacturer's excise tax" assessed and collected under the aforesaid effective section of the Revenue Act of 1932.

We also incline very strongly to the conclusion that, apart from the right of the taxpayer to a refund of the wrongfully demanded and collected excess taxes under the applicable revenue laws, the record before us entitles the taxpayer to the refund under the equitable remedy of money had and received. See *Bull, Executor, v. United States*, 295 U. S. 247; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, at page 350.

In view of our conclusion that the refund sued for in this action is for an unjustly collected manufacturer's excise tax, the administrative procedure under Section 902, et seq. of the Revenue Act of 1936 is unnecessary and inapplicable. In this connection the attitude and action of the governmental tax agencies throughout, as shown by the record before us, indicates that the claim in suit was considered by them as pertaining to an "additional manufacturer's tax," and we think that the United States should now in good conscience be prevented from taking a contrary stand to the prejudice of a wronged taxpayer.

The ultimate question is whether or not the plaintiff company is entitled under the record before us to the tax refund demanded in this action.

The observation of Justice Holmes, in *Rock Island, etc., Railroad Co. v. United States*, 254 U. S. 141, that "Men must turn square corners when they deal with the Government. If it attaches even purely formal conditions to its consent to be sued those conditions must be [73] complied with," are strikingly applicable to the right of the plaintiff corporation to require in this action payment to it of money in the United States Treasury which has been wrongfully exacted from another company as taxes.

The plaintiff by its "First Amended Petition" alleges its right to recover the erroneously computed and collected manufacturer's excise tax by reason of its sole ownership of the capital stock and assets of the taxpayer, and also because of two assignments to it dated June 30, 1934, and August 14, 1935, respectively, of all claims, rights and choses in action which the taxpayer then had or might have against all persons, firms or corporations, and particularly the tax refund claim against the United States. The only substantial difference between the two assignments appears to be that the latter was acknowledged before a notary public while the former is not so acknowledged.

It is to be noted that there is a variance between this enlarged claim in the amended petition and the claims for refund which were filed by the taxpayer and by plaintiff company with the Commissioner of Internal Revenue and rejected by him. In the latter under Form 843 the claims are based solely upon

the assignments and there is no mention therein of the stock ownership of the corporation taxpayer.

The Supreme Court has held that literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before suit is brought for a tax refund may be insisted upon by the defendant, whether the Collector or the United States. *Tucker v. Alexander, Collector*, 275 U. S. 228.

The variance to which we have adverted is not occasioned by failure to comply with statutory requirements but rather to the requirement of the Treasury regulations [74] which state that claims for refund must set forth in detail each ground upon which they are made, and facts sufficient to apprise the Commissioner of the exact basis thereof. Such a requirement may be waived. *Tucker v. Alexander*, *supra*; *University Distributing Co. v. United States*, 22 Fed. Supp. 794; *Con-Rod Exchange, Inc. v. Henriksen, etc.*, 27 Fed. Supp. 427. The Commissioner, as shown by Exhibit "H" in evidence, appears to have rejected all claims for refund upon the broad ground that no right to refund existed in the taxpayer or the plaintiff under the Commissioner's interpretation of Section 9a of the Agricultural Adjustment Act, and the failure of the United States to insist at any time upon the literal compliance with the regulations is tantamount to a waiver in that regard.

It is settled law that except as to assignments by operation of law all transfers and assignments made

upon any claims upon the United States shall be absolutely null and void unless executed with certain specified formalities after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Section 203, Title 31, U. S. C. A. *Seaboard Air Line Railway v. United States*, 256 U. S. 655; *Kingan & Co. v. United States*, 44 F. (2d) 447.

The position taken by the plaintiff throughout the prosecution of the claim to tax refund demanded by this action has been until the filing of First Amended Petition herein on February 5, 1940, that its cause of action and right to recover is based upon the two assignments—only at such late day did the plaintiff assert its right to the refund as sole stockholder of Pacific Goodrich Rubber Company—or by reason of the taxpayer corporation having [75] dissolved December 21, 1934. There does appear in the record before us an authenticated claim of the plaintiff as successor to the taxpayer company, filed with the Collector July 8, 1936, and marked in evidence as Exhibit “3”, for abatement of certain taxes, in which plaintiff makes the statement that it is the taxpayer by reason of the assignment of June 30, 1934, and the dissolution of the taxpaying corporation on December 21, 1934. This exhibit, we think, does not materially alter the position which has been taken by the plaintiff until the exigency of avoiding the consequence of the statute relating to assigned claims against the United States

became imminent. But the chose in action did not lodge in plaintiff by its ownership of all the corporate stock of the Pacific Goodrich Rubber Company, or by the dissolution of that corporation on December 21, 1934. It vested by reason of the assignments which were executed voluntarily by the two corporations for expressed valuable considerations. The status of the plaintiff as a claimant against the United States is clearly within the inhibition of Section 203, Title 31, U. S. C. A.

The claim in suit has not been allowed, its amount has not been ascertained, and no warrant for its payment has been issued.

Section 621d of the Revenue Act of 1932, 26 U. S. C. A., Title 3443, provides as follows:

"(d) No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, [76] or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund."

This is a statutory requirement which is the yardstick or measuring rod by which we are to determine a litigant's right to sue the United States for refund or credit of an overpayment of a tire manufacturer's excise tax imposed by Section 602 of the Revenue Act of 1932, 26 U. S. C. A., Section 3400, and is the statute invoked by the plaintiff in the case at bar, and in order to maintain the action The B. F. Goodrich Company, a corporation, must bring itself within the literal and strict requirements of this statute. This, we think, it has not done. The plaintiff is not the "person who paid the tax." It is a corporate entity distinct from the corporate taxpayer. The latter, during the manufacturing period upon which the credit or right to refund is claimed, conducted business and commercial operations in its own corporate name and capacity; made its own tax returns to the United States; paid under its protest, upon demand of the governmental taxing agencies, the excess tax and interest which are the subject matter of this action, and claimed the right to refund of the illegally collected manufacturer's tax *sui juris*. It is significant upon the question as to the "person" who paid the tax and as to plaintiff's right to recover it, to note that all of the money sued for was paid or "caused" to be paid by Pacific Goodrich Rubber Company, and that such payments were made partly before and partly after June 30, 1934.

Even the assignments relied on by the plaintiff company recite that they are made upon good and

valuable [77] considerations inuring to the Pacific Goodrich Rubber Company, and the record before this court does not disclose what items made up these considerations. There is no adequate showing before us to warrant the application in this tax refund case of an alter ego principle of law. It is clear that for the protection of the Government and to prevent circuitous concealments of taxpayers the statutory requirement for tax refunds should be followed to the letter.

We think there is also another insuperable barrier to any refund to the plaintiff in this action under the record before us.

The burden of proving its right to refund rests throughout the action upon the plaintiff corporation and this burden is not sustained unless satisfactory evidence preponderates in plaintiff's favor, particularly that there has been no inclusion or collection by Pacific Goodrich Rubber Company of the tax in the price of the tires which have been sold by Pacific Goodrich Rubber Company. Substantially the only evidence produced upon this vital point is in the form of a stipulation entered into by Government counsel with the reservation as to its sufficiency, that the cashier and auditor of the taxpayer corporation would if called as a witness testify that he supervised, controlled and kept the books and records of the Pacific Goodrich Rubber Company at all times pertinent to this action and that he is familiar with and knows the prices at which tires were sold by the taxpayer at all applicable times;

that he knows that during the period from August 1, 1933, to January 5, 1934; the taxpayer did not include or intend to include in the price of tires sold during such period any amount to cover any excise tax on the processed cotton contained in the tires manufactured [78] and sold during such period; that the prices at which the taxpayer sold tires during such period were no greater on tires containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act than the prices at which during such period it sold tires containing processed cotton on which a tax was payable under Section 9 of the Triple A. No books of account or sales records were produced and no explanation for their non-production was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue. We are not satisfied that the required burden of the non-passage of the tax to vendees of the taxpayer has been sustained. Judgment is ordered for the defendant. Exceptions to each party on adverse rulings.

Dated December 31, 1940.

PAUL J. McCORMICK,
United States District Judge.

[Endorsed]: Filed Dec. 31, 1940. R. S. Zimmerman, Clerk. By Murray E. Wire, Deputy. [79]

[Title of District Court and Cause.]

**MINUTE ORDER ON DECISION OF ACTION
ON THE MERITS.**

Findings of fact, conclusions of law and judgment for defendant with costs ordered for defendant, upon issues of "First Amended Petition" and stipulated answer of defendant, in accordance with written conclusions of the Court on the merits of the action filed this day. Attorneys for respective parties will collaborate, prepare and present such findings of fact, conclusions of law and judgment within ten days from notice hereof. Exceptions allowed respective parties on each and every adverse ruling.

Dated December 31, 1940. [80]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

Eugene H. Blanche, the attorney of record herein for The B. F. Goodrich Company, a corporation, the plaintiff herein, having died, said The B. F. Goodrich Company, a corporation, has and does hereby substitute and appoint the firm of Newlin & Ashburn as its attorneys of record herein for and in the place of said Eugene H. Blanche.

Dated: this 20 day of January, 1941.

THE B. F. GOODRICH COMPANY

By **J. L. McKNIGHT**

Assistant Secretary

The undersigned do hereby accept the above substitution.

Dated: this 22 day of January, 1941.

NEWLIN & ASHBURN

RAY J. COLEMAN

[Endorsed]: Filed Feb. 3, 1941. R. S. Zimmerman, Clerk. [81]

[Title of District Court and Cause.]

**NOTICE OF MOTION TO REOPEN CASE
TO ADMIT FURTHER PROOF**

To the Above Named Defendant and to Its Attorneys William Fleet Palmer, United States Attorney, and Armond Monroe Jewell, Assistant United States Attorney:

You and Each of You Will Please Take Notice that on Monday, the 17th day of February, 1941, at ten o'clock A. M., or as soon thereafter as counsel can be heard, in Courtroom No. 8 of the above entitled court in the Federal Building, in the City of Los Angeles, California, the plaintiff will move the court to reopen the trial of this action to permit plaintiff to offer further evidence to prove or tending to prove (a) that the tax, the refund of which is sought in this action, was not passed on to the vendees of plaintiff's predecessor in interest, (b) that plaintiff acquired the right to the refund of said tax by operation of law upon the dissolution of plaintiff's predecessor in interest and the distribu-

tion of all of its assets to the plaintiff, (c) that there was no consideration for [83] the written assignments to it of the assets of its predecessor in interest, including the right to the refund of said tax, other than such consideration as normally flows from a distribution in liquidation, (d) that plaintiff is the proper party under Sec. 621(d) of the Revenue Act of 1932 to assert the rights of and establish the facts required to be established by "the person who paid the tax," (e) that it was and is the policy and practice of the Commissioner of Internal Revenue to permit the transferee by operation of law of a right to the refund of manufacturer's excise taxes to assert the rights of and establish the facts required to be established by "the person who paid the tax," and (f) that plaintiff's predecessor in interest although a separate corporation was a wholly owned subsidiary of the plaintiff, that said corporation and the plaintiff had common officers and an interlocking board of directors and that plaintiff's predecessor in interest was operating with a deficit at the time the tax sought to be recovered herein was paid and that as a consequence the payment of said tax although made by check of the plaintiff's predecessor in interest actually reduced plaintiff's assets; to permit the plaintiff to amend its First Amended Petition to conform with the proof; to permit the defendant to offer such evidence in rebuttal as it may see fit; and to permit further argument of counsel upon such evidence as may be received by the court.

That said motion will be based upon the following grounds:

1. That the further evidence sought to be introduced to prove the facts alleged in item (a) on page 1 above would have been offered at the trial except for the fact that plaintiff and its counsel were of the opinion, based upon conversations with defendant's counsel prior to trial and upon the stipulation of counsel for plaintiff and defendant made in open court, that no right was reserved in the defendant to object to the testimony set forth in the stipulation of facts on the ground that it was not the best evidence and that plaintiff and its counsel were not aware of any misunderstanding or [84] basis for misunderstanding of counsel with reference thereto and did not anticipate that said stipulation made in open court would or could be construed by the court to permit the defendant to object to such testimony on the ground that it was not the best evidence;

2. That the further evidence sought to be introduced to prove the facts alleged in items (b) and (c) on page 1 above would have been offered at the time of trial except for the fact (1) that the plaintiff by its First Amended Petition intended to and thought that it had based its right of recovery solely upon the transfer to it by operation of law of the right to the refund of said tax, (2) that the defendant neither alleged nor urged any defense based upon the contention that plaintiff's right of recovery was bottomed upon said written assignments, (3) that the plaintiff did not allege in its

First Amended Petition or otherwise contend that said assignments were executed for a valuable consideration other than that which normally flows from a distribution in liquidation, nor did the defendant so contend either by defenses raised in its answer or otherwise, and (4) that plaintiff and its counsel were of the opinion that the evidence introduced at the time of trial was sufficient to conclusively prove that the right to the refund of said tax was transferred to the plaintiff by operation of law upon the distribution to it in liquidation of the assets of its predecessor in interest and that said assignments, as alleged in plaintiff's First Amended Petition, were only physical evidence of the distribution in liquidation and that there was no consideration therefor other than that which normally flows from such distribution;

3. That the further evidence sought to be introduced to prove the facts alleged in items (d), (e) and (f) on pages 1 and 2 above would have been offered at the time of trial except for the fact that the claims for refund which were filed by the plaintiff and its predecessor in interest were not rejected on the ground that [85] the plaintiff was not "the person who paid the tax" within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932, that no defense to that effect was expressly alleged in the defendant's answer or asserted by the defendant at time of trial or in the brief which it filed with the court, and that it was the understanding of the plaintiff and its counsel

that it was the established policy and practice of the Commissioner of Internal Revenue to permit the transferee by operation of law of a right to the refund of manufacturer's excise taxes to assert the rights of and establish the facts required to be established by "the person who paid the taxes";

4. That the further evidence sought to be introduced is essential to a proper determination of the issues presented in this case and in the interests of justice should be presented to the court for its consideration;

5. That the further evidence sought to be introduced relates either to issues on which such evidence was deemed unnecessary by reason of stipulation of counsel or to defenses which the plaintiff with good excuse did not anticipate since they were not urged by the Commissioner of Internal Revenue in advance of trial or by the defendant at time of trial and were first advanced by the court itself after the trial had been concluded and the briefs of both parties submitted.

That said motion will be based upon this written notice thereof and upon the memorandum of authorities and the affidavits of F. C. Leslie, George Hubbell and S. M. Jett hereto annexed, and upon the minutes, records and files of the above entitled court in this cause.

Dated: Feb. 3, 1941.

NEWLIN & ASHBURN

By RAY J. COLEMAN

Attorneys for Plaintiff [86]

[Title of District Court and Cause.]

MEMORANDUM OF AUTHORITIES IN
SUPPORT OF MOTION TO REOPEN

1. When the trial judge after submission of a case concludes that material and necessary testimony which has been offered is not competent he should reopen the case of his own motion to admit further proof.

Paine v. St. Paul Union Stockyards Co., 28 F. (2d) 463, 467;

4 Cyc. of Fed. Proc., Sec. 1454, p. 998.

2. Until final judgment the case is under the control of the court which may reopen it for further proof at any time.

G. Amsinck & Co. v. Springfield Grocer Co.
7 F. (2d) 855, 858;

4 Cyc. of Fed. Proc., Sec. 1454, p. 998.

3. The assignment by a corporation to its stockholders of a claim against the United States merely passes legal title to such claim to parties who already own the entire beneficial interest [87] therein and such assignment even in the absence of a formal dissolution of the corporation is not rendered void under Section 3477 of the Revised Statutes where the assignment of such claim together with the other assets of the corporation is intended to effect a distribution in kind of all of the assets of the corporation.

Novo Trading Corp. vs. Commissioner of Internal Revenue (C. C. A. 2) 113 F. (2d) 320;

Kingan & Co. v. United States, 44 F. (2d) 447, 451;

Consolidated Paper Co. v. United States, 59 F. (2d) 281, 288; cert. den. (1933) 77 L. ed. 988.

4. In the event of the transfer of a claim against the United States, which transfer is not rendered void under Section 3477 of the Revised Statutes, the transferee rather than the transferor of such claim is the proper party to file the refund claim and to maintain a suit to recover on the claim.

G. C. M. 21058; C. B. 1939-1 (Part I) p. 280; Monarch Mills v. Jones, 56 F. (2d) 180, 183; (Aff'd 59 F. (2d) 502.)

Consolidated Paper Co. v. United States, 59 F. (2d) 281, 288; cert. den. (1933) 77 L. ed. 988.

Kingan & Co. v. United States, 44 F. (2d) 447, 451;

National Foods, Inc. v. United States, 13 F. Supp. 364; 82 Ct. Cl. 627; cert. den. Oct. 12, 1936;

5. The transferee by operation of law of the right to a refund of manufacturer's excise taxes is the proper party under Sec. 621(d) of the Revenue Act of 1932 to assert the rights of and establish the facts required to be established by "the person who paid the tax."

G. C. M. 21058; C. B. 1939-1 (Part I) p. 280.

In G. C. M. 21058, *supra*, G. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, made the following statements: [88]

"It is held, therefore, that title to the claim in the present case was obtained by the N Company by operation of law and that the provisions of section 3477 did not preclude its transfer.

"The question remains as to whether a proper claim for refund has been filed in this case.

"Section 903 of the Revenue Act of 1936 provides that 'No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person * * *.' The person who paid the tax in this case was the M Company. However, that company, if still in existence, has neither interest nor title to the claim for refund. The N Company 'stands in the shoes' of the M Company, having acquired all right, title, and interest in the claim against the Government. In *National Foods, Inc., v. United States* (82 Ct. Cl., 627, 13 Fed. Supp. 364, certiorari denied October 12, 1936) it was held that the assignor of a claim against the Government (which claim had been transferred by operation of law) was not the proper party to maintain a suit to recover on the claim. It is held in the present case that the N Company is the proper party to file the refund claim." [89]

[Title of District Court and Cause.]

**AFFIDAVIT OF F. C. LESLIE
IN SUPPORT OF MOTION TO REOPEN**

United States of America,

State of Ohio,

County of Summit ss.

F. C. Leslie, being by me first duly sworn, deposes and says:

That affiant is the assistant counsel for The B. F. Goodrich Company, a corporation, the plaintiff herein, and as such was present at the trial of the above entitled action before the above named court on February 10, 1940, and participated in said trial after having first secured the consent of the court so to do.

That Eugene H. Blanche, the attorney of record for the plaintiff herein at the time of the trial and for some time prior thereto, died before the entry on December 31, 1940, of the court's "Minute Order on Decision of Action on the Minutes."

That affiant participated in the preparation of the stipulation of facts which was filed in said action and is familiar with [90] the terms thereof and with the conditions upon which it was agreed by counsel for plaintiff and defendant that the same might be filed with the court; that said conditions were stated by said Eugene H. Blanche in open court at the time of trial in the following words:

"By stipulation of counsel for the Government there will be no question of a foundation

raised. However, there may be raised, either at this time, or at the time of the filing of the brief, a question regarding, or questions regarding, the materiality of the facts stipulated to, the relevancy of the facts stipulated to and of the sufficiency of the proof made.

"We appreciate that the latter may always be raised, but in order that there may be no misunderstanding, we make that statement.

"The latter sufficiency of the proof made particularly pertains to the question of, whether the tax was passed on to the consumer or whether the tax was subsequently billed by the consumer after the tax was assessed and levied."

That prior to the trial of said action and the making of said statement in open court, one or more conferences were held in the City of Los Angeles, at which said Eugene H. Blanche, the affiant, and Armond Monroe Jewell, the attorney for the defendant were present and at which the stipulation of facts and the conditions under which it would be filed were discussed. That at one or more of said conferences and in particular at a conference held at the office of the plaintiff in Los Angeles County, California; at which George Hubbell, an officer of the Pacific Goodrich Rubber Company, was also present, it was agreed that the stipulation of facts should be filed without the reservation of any objection except as to the ma-

teriality and relevancy of the stipulated facts and as to the sufficiency of the proof made. That at that time, said Armond Monroe Jewell stated that his reservation as to the sufficiency of the proof did not go to the foundation of the stipulated testimony and in the discussion as to whether or not a reservation should be preserved, said Jewell gave as one of his reasons for wanting such reservation that it had been the Commissioner's theory in other cases that the establishment of the fact that [91] the tax was not included in the price charged to the purchaser did not conclusively establish or prove that the tax was not passed on to the purchaser; that after the filing of the defendant's brief in said action, in which the objection to the testimony of said George Hubbell was first raised on the ground that it was not the best evidence, the said Eugene H. Blanche stated to affiant that it was never his intention that there should be reserved in either the plaintiff or the defendant any right to object to the testimony set forth in the stipulation on the ground that it was not the best evidence and that it was not and never had been his understanding that such right had been reserved; that on the contrary it was his intention and understanding, as stated in open court in the presence of counsel for the defendant, that "there (would) be no question of a foundation raised" and that any objection to the sufficiency of the proof made would be such an objection as might "always be raised," that is, an objection based

upon a failure to sustain the burden of proof rather than a failure to produce the best evidence.

That based upon the aforementioned discussions with said Armond Monroe Jewell, the attorney for the defendant; upon statements made by Eugene H. Blanche to affiant prior to the time of trial with reference to his understanding of the purpose of the reservation of the right to object to the sufficiency of proof and upon the affiant's own independent interpretation and understanding of the above quoted statement made by said Eugene H. Blanche in open court, it was the belief of affiant at the time of trial and still is his belief that no right was reserved in the defendant to object to the testimony of George Hubbell as set forth in the stipulation of facts on the ground that it was not the best evidence; that had affiant known that counsel for defendant did not concur in this belief and that there was a misunderstanding between counsel for plaintiff and defendant as to the reservation of such right or that the above quoted statement of said Eugene H. Blanche would be construed by the court as [92] reserving such right in the defendant, affiant would have and could have caused to be produced in court at the trial of said action books and records of Pacific Goodrich Rubber Company, the predecessor of the plaintiff, which, together with other competent and admissible testimony interpreting such books and records in conformity with the policy, intent and practices

of such corporation, would have confirmed the testimony of said George Hubbell as to the ultimate facts as set forth in the stipulation of facts, and would have shown that the tax in question was not passed on to the vendees of said corporation.

That the First Amended Petition of the plaintiff was filed in said action pursuant to the instructions and advice of the affiant and it was the intent of the affiant as therein alleged, and said Eugene H. Blanche stated to affiant that it was his intention as therein alleged, to base the plaintiff's right of recovery solely upon the fact that the plaintiff as the sole shareholder of Pacific Goodrich Rubber Company "became by operation of law, pursuant to a distribution in kind to it by Pacific Goodrich Rubber Company, the sole owner of and vested with title to" the right to secure the refund of the taxes in question. That in conformity with such intent and as proof of said allegations of the First Amended Petition and the further allegations that the two written assignments of assets which were executed by Pacific Goodrich Rubber Company in favor of the plaintiff on June 30, 1934, and August 14, 1935, respectively, were merely "physical evidence, affirmative proof and in confirmation of" said "distribution in kind" the plaintiff caused to be introduced in evidence at the time of trial the testimony of J. C. Herbert that the plaintiff was, at all times, the sole stockholder of Pacific Good-

rich Rubber Company and that said Company was dissolved on or about December 21, 1934, and also caused to be introduced in evidence a certified copy of the certificate of dissolution of said corporation dated December 21, 1934, and [93] certified copies of the minutes of the special meetings of the Board of Directors and stockholders of said corporation held on July 6, 1934, in which is set forth the duly adopted resolutions of said bodies to dissolve the Pacific Goodrich Rubber Company and to ratify the action previously taken by its management in transferring and delivering over all of its assets to the plaintiff "as a distribution in kind to the stockholders of all the assets of said corporation" and in which stockholders' minutes there appears the statement that said corporation "acting through its officers, had transferred and delivered over to The B. F. Goodrich Company at the close of business on June 30, 1934, all of its assets in anticipation of the immediate dissolution of the Company." That said Eugene H. Blanche stated to affiant that it was his belief and it also was and is the belief of affiant that such testimony and evidence conclusively proved the aforementioned allegations of the First Amended Petition and also conclusively proved that said written assignments of assets were, as alleged in said petition, only physical evidence and affirmative proof of said distribution in kind and that there was no consideration for said assignments other than that which normally flows from

a distribution in liquidation; that said Eugene H. Blanche also stated to affiant that it was his belief that it also was and is the belief of affiant that even if such testimony and proof did not conclusively prove that there was no consideration for said assignments other than that which normally flows from a distribution in liquidation, that said assignments, to the extent that they embraced claims against the United States, were nevertheless void and of no effect as instruments of transfer apart from the distribution in liquidation and, being void, such testimony and evidence did conclusively prove that all claims against the United States which remained in the Pacific Goodrich Rubber Company [94] by reason of such invalidity, passed to the plaintiff by operation of law upon the dissolution of the Pacific Goodrich Rubber Company. That had there been any issue raised by the pleadings or had the defendant asserted any defense based upon the contention that the plaintiff was relying either in whole or in part upon the two aforementioned assignments as the basis for its recovery or had affiant known that the court, as noted on page 7 of its Conclusions on the Merits, would construe the allegations of said First Amended Petition as an assertion by the plaintiff of the right of recovery not only "by reason of its sole ownership of the capital stock and assets of the taxpayer" but "also because of two assignments to it dated June 30, 1934, and August 14, 1935, respectively"

or had the defendant asserted any defense or advanced any contention to the effect that said assignments were not executed and delivered as a step in the dissolution of the Pacific Goodrich Rubber Company or that said assignments were executed and delivered for a valuable consideration other than that which normally flows from a distribution in liquidation or had affiant known or anticipated that further evidence in this connection would be desired by the court despite the invalidity of such assignments as instruments of transfer apart from the distribution in liquidation, affiant would have asked leave of the court to amend said First Amended Petition to more clearly express the intent of the plaintiff to base its right of recovery solely upon the rights acquired by it through operation of law upon the distribution in liquidation and affiant could and would have caused to be offered in evidence competent and admissible testimony of an executive officer or officers of the B. F. Goodrich Rubber Company and [95] Pacific Rubber Company, who brought about such "distribution in kind" on June 30, 1934, that such distribution was intended to be and was in fact a distribution in liquidation and was made in anticipation of the immediate dissolution of said Pacific Goodrich Rubber Company, that the two aforementioned assignments were executed by Pacific Goodrich Rubber Company in favor of plaintiff for the sole purpose of evidencing such transfer, that there was no agreement or understanding between the

Pacific Goodrich Rubber Company and the plaintiff for the payment of any consideration for the transfer of said assets and that there was no consideration for such transfer or for said assignments other than the surrender by the plaintiff in due course of dissolution of its shares of stock of Pacific Goodrich Rubber Company for cancellation.

That the claims for refund which were filed by the plaintiff were not rejected by the Commissioner of Internal Revenue on the ground that the plaintiff was not "the person who paid the tax" within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932, nor was any defense to that effect expressly alleged in the defendant's answer or asserted by the defendant at time of trial or in the brief which it filed with the court. That by reason of these facts and the further fact that it was the established policy and practice of the Commissioner of Internal Revenue, as understood by affiant, to permit the transferee by operation of law of a right to the refund of manufacturer's excise taxes to assert the rights of and establish the facts required to be established by "the person who paid the tax," the affiant was [96] of the belief that the plaintiff could properly assert the rights of and establish the facts which under the provisions of Sec. 621 (d) of the Revenue Act of 1932 are required to be established by "the person who paid the tax;" that had affiant anticipated any possibility of the contention being advanced that under said Sec. 621 (d) of the Revenue

Act of 1932 plaintiff could not assert the rights of or establish the facts required to be established by "the person who paid the tax," or had affiant anticipated that there would be any uncertainty in the court's mind with reference thereto he could and would have attempted to subpoena the Collector of Internal Revenue or other proper agent of the defendant to testify with reference to the aforementioned practice and policy of the Commissioner of Internal Revenue, and could and would have caused to be offered in evidence competent and admissible testimony to the effect that the Pacific Goodrich Rubber Company, although a separate corporation, was a wholly owned subsidiary of the plaintiff, that said corporation and the plaintiff had mutual officers and interlocking Boards of Directors, and that said Pacific Goodrich Rubber Company was operating with a deficit at the time the tax sought to be recovered herein was paid and that as a consequence, the payment of said tax, although made by check of the Pacific Goodrich Rubber Company, actually reduced plaintiff's assets.

[97]

That affiant is of the firm conviction that the plaintiff can, and if given an opportunity to do so will, introduce evidence conclusively proving that the taxpayer bore the burden of the tax sought to be recovered in this action and that said tax was not passed on to the customers of the taxpayer.

F. C. LESLIE

Subscribed and sworn to before me, the undersigned authority, on this the 30th day of January, 1941.

ALBERTA M. TEWERS,

Notary Public in and for
said State and County.

My Commission Expires November 16, 1941.

(Seal) [98]

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE HUBBELL
IN SUPPORT OF MOTION TO REOPEN

United States of America,
Southern District of California,
Central Division—ss.

George Hubbell, being by me first duly sworn, deposes and says:

That during the period from August 1, 1933, to June 12, 1934, he was the auditor of the Pacific Goodrich Rubber Company, a corporation; that during the period from June 12, 1934, to June 30, 1934, he was the assistant secretary and assistant treasurer of said corporation and that at all times since June 30, 1934, he has been an assistant treasurer of The B. F. Goodrich Company, a corporation.

That at all times during the period in issue in the above entitled action, certain books of account and records of said Pacific Goodrich Rubber Com-

pany were kept under his supervision and control; that he is familiar therewith; that it was his duty to keep all such books of account and records; that all entries made in said books of account which were not made by him were made under his direct supervision; that said books of account and records were kept in the regular course of the business of said corporation; that the business of said corporation is of a character in which it is proper and customary to keep such books of account and records; that the entries in such books of account are either the original entries or the first permanent entries of the transactions recorded therein, and [99] were made at the time, or within reasonable proximity to the time, of such transactions; and that the person making such entries had personal knowledge of the transactions or obtained such knowledge from a report regularly made to him by some other person employed in the business of said corporation whose duty it was to make such report in the regular course of business.

That if called as a witness in the above entitled action, he can and will produce from the aforementioned books of account and records of said Pacific Goodrich Rubber Company invoices, inventory records, manufacturing records, sales records and cost records from which, together with certain tax records and returns and the manufacturer's excise tax schedules prepared by said corporation and made effective by it on August 1, 1933, and in conjunction with his oral testimony

interpreting the same it can be shown and will appear that the testimony of affiant, as set forth in the Stipulation of Facts filed in the above entitled action, is in all respects true and correct, and from which it can be shown and will appear and upon the basis of which he can and will testify that the tax (the refund of which is sought in the above entitled action) was not passed on to the vendees of said corporation; that all tires containing cotton held for sale on August 1, 1933, and therefore subject to the floor stocks tax, were sold and the purchasers billed therefor long before any demand was made upon said corporation to pay said tax and at a time when said corporation, as he can and will testify and as said books and records will show, had no intention of paying said tax or thought of being required to pay it; that no additional sums were charged to or collected from said purchasers after demand for and payment of said tax.

That in particular said books and records will show and, upon the basis thereof, affiant can and will testify that effective August 1, 1933, said corporation prepared and released for its own use revised schedules of the manufacturer's excise tax payable [100] upon the sale of tires containing cotton; that the amount of the manufacturer's excise tax specified in said revised schedules was the net excise tax, namely, the excise tax less the credit for floor stocks or processing tax payable upon the cotton contained in said tires; that sub-

sequent to August 1, 1933, said revised schedules were used in determining the cost to the corporation of all tires manufactured and sold by it, and in determining the amount of the manufacturer's excise tax to be charged to those customers who were billed with said tax as a separate item.

That said books and records will further show and, upon the basis thereof, affiant can and will testify that said corporation had two types of customers, namely, original equipment customers and general wholesale customers; that on all invoices to original equipment customers the net excise tax, namely, the excise tax less the credit for the floor stocks or processing tax, was charged as a separate item; that on all invoices to general wholesale customers no separate charge was made for excise taxes, but, in determining the cost to the corporation of the tires sold to such customers, only the net excise tax, namely, the excise tax less the credit for floor stocks or processing tax, was included.

GEORGE HUBBELL

Subscribed and sworn to before me this 30th day of January, 1941.

ELIZABETH AKERMAN,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Dec. 3, 1942.

(Seal) [101]

[Title of District Court and Cause.]

**AFFIDAVIT OF S. M. JETT .
IN SUPPORT OF MOTION TO REOPEN**

United States of America,
State of Ohio,
County of Summit—ss.

S. M. Jett, being by me first duly sworn, deposes and says:

That he is the secretary and a member of the Board of Directors of The B. F. Goodrich Company, the plaintiff in the above entitled action.

That at all times during the period from August 1, 1933, to December 21, 1934, he was the secretary and a member of the Board of Directors of the Pacific Goodrich Rubber Company and of The B. F. Goodrich Company.

That he was familiar with and had personal knowledge of the business and affairs of said Pacific Goodrich Rubber Company during said period from August 1, 1933, to December 21, 1934, and if called as a witness in the above entitled action he can and will testify of his personal knowledge as follows: [102]

That all of the stock of the Pacific Goodrich Rubber Company from the date of its issuance until the dissolution of said corporation was owned by The B. F. Goodrich Company; that on June 30, 1934, and for some time prior thereto six of the seven directors of Pacific Goodrich Rubber

Company were officers of The B. F. Goodrich Company and five of these six were also directors of The B. F. Goodrich Company.

That on June 30, 1934, Mr. J. D. Tew was the President and a member of the Board of Directors of the Pacific Goodrich Rubber Company. That on said date said J. D. Tew on behalf of said corporation and in his capacity as the President thereof, executed in the presence of affiant the written assignment of the assets of said corporation to The B. F. Goodrich Company, a copy of which assignment is set forth in the first amended petition of the plaintiff in the above entitled action.

That on June 12, 1934, the Board of Directors of The B. F. Goodrich Company, at a meeting duly called and held and at which a quorum was present and acting, by unanimous vote "Resolved, that the officers of the company be and they hereby are authorized to so alter the methods of distribution of the products manufactured by this company as to eliminate as far as feasible sales through subsidiary corporations and to report their action in this respect to this Board."

That prior to the execution of said assignment an informal meeting of a majority of the Board of Directors of said Pacific Goodrich Rubber Company, was held at Akron, Ohio, at which meeting the affiant, said J. D. Tew, S. B. Robertson and T. B. Tomkinson were present. That at said meeting it was proposed that said corporation be dissolved, that all of its assets be distributed in kind

to its sole stockholder, The B. F. Goodrich Company; that such distribution be made on June 30, 1934, and that meetings of the Board of Directors and of the stockholders of said Pacific Goodrich Rubber Company be held as soon as reasonably possible thereafter to authorize such dissolution and to ratify the act of said corporation in making said distribution in kind; that the affiant and all other persons present at said meeting expressed their consent and approval of said proposal. [103]

That meetings of the Board of Directors of the stockholders of said Pacific Goodrich Rubber Company were held at Akron, Ohio, on July 6, 1934, and certified copies of the minutes of said meetings were furnished by affiant for introduction in evidence at the trial of the above entitled action. That at said meetings said J. D. Tew, as President of said corporation, announced that the corporation acting through its officers had transferred and delivered over to The B. F. Goodrich Company at the close of business on June 30, 1934, all of its assets in anticipation of the immediate dissolution of the corporation, and it was unanimously resolved that said corporation be dissolved and that the act of the management in making said distribution in kind be and it was ratified.

That said assignment of June 30, 1934, was executed by said J. D. Tew as President of the Pacific Goodrich Rubber Company and attested by affiant as Secretary of said corporation solely for the purpose of evidencing said distribution in

kind. That there was no agreement or understanding between the Pacific Goodrich Rubber Company and The B. F. Goodrich Company for the payment of any consideration for said assignment or for said distribution in kind, and there was no consideration of any kind received by the Pacific Goodrich Rubber Company or intended to be received by it for said assignment other than the surrender for cancellation by The B. F. Goodrich Company in due course of dissolution of its shares of stock in said Pacific Goodrich Rubber Company.

S. M. JETT

Subscribed and sworn to before me this 28 day of January, 1941.

RUTH REES,

Notary Public.

My commission expires Aug. 28, 1941.

(Seal)

[Endorsed]: Notice of Motion to Reopen Case, etc., Filed Feb. 3, 1941. R. S. Zimmerman, Clerk.

By J. M. Horn, Deputy. [104]

[Title of District Court and Cause.]

**AFFIDAVIT OF ARMOND MONROE JEWELL,
IN OPPOSITION TO MOTION TO
REOPEN.**

State of California,
County of Los Angeles—ss.

Armond Monroe Jewell, being first duly sworn,
deposes and says:

That affiant is an Assistant United States Attorney for the Southern Judicial District of California and, as such, prepared the above entitled case for trial on behalf of the United States of America, defendant; and that affiant, as such Assistant United States Attorney, was present at the trial of the above entitled matter before the above named Court on February 10, 1940 and represented the said United States of America, defendant at the said trial;

That affiant represented the said United States of America, defendant, in the preparation of the Stipulation of Facts, which was filed in said action and therefore is familiar with the provisions thereof; that prior to said trial several conferences with reference to the Stipulation of Facts were held in the City of Los Angeles;

That these conferences were originally held between Eugene H. Blanche, now deceased, then counsel for plaintiff, and affiant; that a few days before trial Mr. F. C. Leslie, Assistant Counsel for the B. F. Goodrich Company, plaintiff herein, arrived

from Akron, Ohio, and participated in one or two of these conferences;

That at these conferences the Stipulation of Facts was discussed [106] and prepared;

That at these conferences the issue as to whether or not plaintiff had passed on the burden of the tax was discussed; that, in particular, there was discussed the manner in which plaintiff would attempt to prove that said burden of the tax had not been passed on; that affiant was informed by Mr. Blanche that it was his intention to call Mr. George Hubbell and Mr. J. C. Herbert, both officers of the plaintiff, and of the plaintiff's predecessor, and from them to adduce verbal testimony to the effect that the burden of the tax had not been passed on; that, as is customary with affiant in order to save the time of the Court in the trial of these tax cases, affiant suggested that if he were personally permitted to discuss the matter with Messrs. Hubbell and Herbert, he would stipulate as to what these witnesses might testify if they were called as witnesses and, thus, save the time of the Court at the trial; that, whereupon, affiant talked to Messrs. Hubbell and Herbert and, as a result of these conversations, he became personally convinced that they would unqualifiedly so testify were they called to Court;

That affiant and counsel for plaintiff then prepared a Stipulation which set forth what both of the respective counsel believed would be the testimony of these witnesses were they called to testify;

that at one of these conferences (the particular conference is not recalled by affiant) it was expressly agreed between affiant and Mr. Eugene H. Blanche that all reservations as to the sufficiency of the testimony to sustain the burden of proof of plaintiff would be reserved and, further, that affiant specifically cautioned the said Eugene H. Blanche that affiant did not believe that the verbal testimony of Messrs. Hubbell and Herbert was sufficient in that it was not the best evidence and affiant suggested that the books and records of plaintiff or plaintiff's predecessor, if any, were the only proper proof;

That at no time was it the intention of affiant to agree in [107] stipulating to what Messrs. Herbert and Hubbell would testify if they were called, that affiant on behalf of defendant waived the right to object to the introduction of these stipulations re testimony on the ground that the same were not the best evidence of the facts which the stipulations re testimony sought to prove;

That when Mr. Blanche in open court made the statement with reference to the Stipulation of Facts, that "By stipulation of counsel for the Government there will be no question of a foundation raised" affiant assented to the statement; that in so doing affiant did not intend to waive the right to object to the stipulated testimony upon the ground that it was not the best evidence.

ARMOND MONROE JEWELL.

Subscribed and Sworn to before me, this 14 day
of April, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk, U. S. District Court,
Southern District of Cali-
fornia,

By LOUIS J. SOMERS,

Deputy.

[Endorsed]: Filed Apr. 14, 1941. R. S. Zimmer-
man, Clerk. By J. M. Horni, Deputy. [108]

At a stated term, to-wit: The February Term,
A. D. 1941, of the District Court of the United
States of America, within and for the Central Divi-
sion of the Southern District of California, held at
the Court Room thereof, in the City of Los Angeles
on Tuesday, the 15th day of April in the year of
our Lord one thousand nine hundred and forty-one.

Present: The Honorable: Paul J. McCormick, Dis-
trict Judge.

[Title of Cause.]

This cause coming on for hearing on motion of
the plaintiff to re-open the case and to admit fur-
ther proof, pursuant to notice, filed February 3,
1941; Ray J. Coleman, Esq., appearing as counsel
for the plaintiff, A. M. Jewell, Assistant U. S.
Attorney, appearing as counsel for the Government;
and C. W. Lunsford, court reporter, being present
and reporting the testimony and the proceedings;

At 10:25 A. M. Attorney Coleman makes a statement in support of motion; at 10:40 A. M. Attorney Jewell makes a reply statement in opposition; and at 10:50 A. M. Attorney Coleman makes closing statement in support of motion.

The Court renders oral opinion and orders that the motion be denied. [109]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial on February 10, 1940, plaintiff being represented by F. C. Leslie, Esquire, and Eugene H. Blanche, Esquire, and defendant being represented by the United States Attorney for the Southern Judicial District of California, through Armond Monroe Jewell, Assistant United States Attorney, and evidence having been offered to and received by the Court, and the cause ordered submitted upon the filing of briefs in behalf of each party, and the said briefs having been filed, and this Court having drawn its "Conclusions of the Court on the Merits of the Action", and plaintiff, by its attorneys Newlin & Ashburn, through Ray J. Coleman, Esquire, having moved to reopen the case to admit further proof, and said motion having been opposed by defendant through its attorneys above named, and the Court having denied plaintiff's said motion to re-

open the case to admit further proof, the Court now makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

That on June 20, 1927, Pacific Goodrich Rubber Company was incorporated under the laws of the State of Delaware, and that said corporation was dissolved on or about December 21, 1934.

II.

That plaintiff now is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws [110] of the State of New York; and that it is and at all times mentioned herein was qualified to do business in the State of California, and has its principal office and place of business in Akron, Ohio, with an office in Los Angeles, California.

III.

That defendant herein, the United States of America, now is and at all times herein mentioned was a body politic.

IV.

That this action arose under the laws of the United States levying and providing for the collection of internal revenue, and more particularly under the Act of June 6, 1932, Chapter 209, Sec. 602, 47 Stat. 261, as modified by the Act of May 12, 1933, Chapter 25, Sec. 9 (a), 48 Stat. 35, and was brought

for the recovery of manufacturer's excise tax paid under protest by the plaintiff's predecessor in interest Pacific Goodrich Rubber Company.

V.

That the tax sought to be recovered in this action was paid to John P. Carter, the Collector of Internal Revenue for the Sixth District of California; that said John P. Carter died prior to the commencement of this action, to-wit, on or about April 24, 1935; that Nat Rogan succeeded the said John P. Carter as Collector of Internal Revenue for the Sixth District of California and still holds that position.

VI.

That on June 30, 1934, eight thousand (8,000) shares of the capital stock of Pacific Goodrich Rubber Company were issued and outstanding, and none of the shares of said stock were subscribed for but unissued; that at all times on and after June 30, 1934, the number of shares of stock of the Pacific Goodrich Rubber Company which were issued and outstanding remained unchanged; and that at no time on or after June, 1934, were any of said shares subscribed for but unissued. [111]

VII.

That at all times from the date of the first issuance of stock of the Pacific Goodrich Rubber Company up to and including the date of its dissolution all of the stock issued by Pacific Goodrich Rubber

Company was issued in the name of plaintiff or in the name of trustees for the benefit of plaintiff and plaintiff was the owner thereof.

VIII.

That, under Section 16 of the Agricultural Adjustment Act (Public No. 10, 73d Congress; May 23, 1933, c. 25, Title I, Sec. 16, 48 Stat. 40; 7 U. S. C. A. Sec. 616), plaintiff's predecessor in interest, Pacific Goodrich Rubber Company, was required to pay a tax upon the sale or other disposition of any article processed wholly or in chief value from cotton which it had on hand or in transit to it on August 1, 1933 (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture), in an amount equivalent to the tax which would have been paid on said cotton had it actually been processed after August 1, 1933, i. e., \$0.044184 per pound; that under Section 9 (a) of said Agricultural Adjustment Act (Sec. 9, 48 Stat. 35; 7 U. S. C. A. Sec. 609), plaintiff's said predecessor in interest was allowed to compute the manufacturer's excise tax on tires levied by Section 602 of the Revenue Act of 1932 by deducting from the weight of said tires the weight of processed cotton in said tires upon which a processing tax, including a floor stocks tax, had been paid under Section 9 (a) or Section 16 (a) of the Agricultural Adjustment Act.

IX.

That on August 1, 1933, plaintiff's predecessor in interest, Pacific Goodrich Rubber Company, held

for sale or other disposition articles processed wholly or in chief value from cotton, to wit, tire fabrics, threads and other materials having a total cotton content of 782,474 pounds, said articles being hereinafter referred to as pro- [112] cessed cotton; that pursuant to Sec. 16 of the Agricultural Adjustment Act and the Regulations of the Secretary of the Treasury established thereunder, the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company, duly prepared and filed with John P. Carter, now deceased the then Collector of Internal Revenue for the Sixth District of California, its return reporting the sale or other disposition of the said processed cotton of 782,474 pounds, and paid to said Collector a tax thereon at the rate of \$0.044184 per pound as duly fixed by the Secretary of Agriculture in the total sum of \$34,648.08. That said tax was paid in four installments as follows:

August 31, 1933.....	\$ 7,368.06
September 30, 1933.....	7,368.06
October 31, 1933.....	11,249.98
November 30, 1933.....	8,666.03

That no portion of said tax of \$34,648.08 has been refunded or credited to plaintiff or to plaintiff's predecessor in interest Pacific Goodrich Rubber Company.

X.

That during the period from August 1, 1933 through January 5, 1934, Pacific Goodrich Rubber

Company manufactured and sold tires (exclusive of tax free tires sold to the government for export) which contained 705,806 pounds of the aforementioned 782,474 pounds of processed cotton which were held for sale or other disposition by said company on August 1, 1933. That the other and remaining 76,668 pounds of processed cotton which Pacific Goodrich Rubber Company held for sale or other disposition on August 1, 1933, were manufactured and sold in rubber products other than tires or wasted.

XI.

That in computing the manufacturer's excise tax imposed by Sec. 602 of the Revenue Act of 1932 on the aforementioned tires manufactured and sold by Pacific Goodrich Rubber Company during the period from August 1, 1933, through January 5, 1934, said company deducted from the weight of said tires the weight of the 705,806 pounds of [113] processed cotton contained therein on which it had paid the tax imposed by Sec. 16 of the Agricultural Adjustment Act. That the manufacturer's excise tax so computed was reported by Pacific Goodrich Rubber Company by the filing of manufacturer's excise tax returns with said John P. Carter, deceased, the then Collector of Internal Revenue for the Sixth District of California, and the amount of the tax so computed, to wit, the sum of $2\frac{1}{4}$ cents per pound on the weight of said tires less the weight of the processed cotton contained therein on which the tax imposed by Sec. 16 of the Agricultural Ad-

justment Act had been paid, was paid to said Collector of Internal Revenue.

XII.

That the aforementioned computation of the manufacturer's excise tax was rejected and disallowed by the defendant and John P. Carter, deceased, the then Collector of Internal Revenue, and on or about April 10, 1934, demand was made upon the Pacific Goodrich Rubber Company by the defendant and said Collector of Internal Revenue for the payment of additional manufacturer's excise tax in the sum of \$15,880.64, together with interest thereon in the sum of \$569.74, which interest was assessed against said company on June 9, 1934; that said additional manufacturer's excise tax demanded of said Pacific Goodrich Rubber Company was a tax of 2½ cents per pound on the 705,806 pounds of processed cotton on which said company had paid the tax imposed by Sec. 16 of the Agricultural Adjustment Act, and the weight of which, for the purpose of computing the manufacturer's excise tax, was deducted by said company from the weight of the tires manufactured and sold by it during the period from August 1, 1933, through January 5, 1934. That in response to said demand said additional manufacturer's excise tax of \$15,880.64 was paid by the Pacific Goodrich Rubber Company on or about April 18, 1934, and the interest thereon of \$569.74 was paid by the Pacific Goodrich Rubber Company on or about July 27, 1934. That said payments were

made under written protest and, solely for the purpose of avoiding [114] penalties and interest, and said Collector of Internal Revenue was so advised at the time of payment. That the defendant and said Collector of Internal Revenue in arriving at the amount of the additional manufacturer's excise tax and the interest thereon to be demanded of the Pacific Goodrich Rubber Company determined for their convenience that the additional tax should be demanded for the months of November and December, 1933, and the Pacific Goodrich Rubber Company did not object to this action if demand for an additional manufacturer's excise tax was to be made but did object to any additional taxes being demanded.

XIII.

On July 6, 1934 the Board of Directors of Pacific Goodrich Rubber Company held a meeting; a true copy of the minutes of said meeting are on file herein and marked plaintiff's Exhibit "I".

XIV.

On July 6, 1934 the stockholders of the Pacific Goodrich Rubber Company held a meeting; a true copy of the minutes of said meeting are on file herein and marked plaintiff's Exhibit "I".

XV.

On August 24, 1934 the Board of Directors of Pacific Goodrich Rubber Company held a meeting; a true copy of the minutes of said meeting are on file herein and marked plaintiff's Exhibit "I".

XVI.

On June 30, 1934 the Pacific Goodrich Rubber Company executed an assignment to the plaintiff, a true copy of which assignment appears on page three of plaintiff's "First Amended Petition."

XVII.

On August 14, 1935 the Pacific Goodrich Rubber Company executed an assignment to plaintiff, a true copy of which assignment appears on pages four and five of plaintiff's "First Amended Petition."

XVIII.

That on or about August 31, 1935, each the plaintiff and the [115] Pacific Goodrich Rubber Company filed with Nat Rogan, the then Collector of Internal Revenue for the Sixth District of California, a claim for refund dated August 19, 1935, of the additional manufacturer's excise tax and interest thereon in the aggregate sum of \$16450.39 which was paid by the Pacific Goodrich Rubber Company under protest as described in paragraph XII above. That each of said claims was made upon the ground alleged therein that under Sec. 9 of the Agricultural Adjustment Act the taxpayer in computing the manufacturer's excise tax on the tires manufactured and sold by it was entitled to deduct from the weight of said tires the weight of the processed cotton therein on which it had paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act; that as an additional reason for the

allowance of the plaintiff's claim, it was alleged therein that the plaintiff was entitled to the refund claimed by reason of the aforementioned assignment of June 30, 1934, from Pacific Goodrich Rubber Company, which assignment is described in paragraph XVI above.

XIX.

That on or about April 21, 1936, each the plaintiff and the Pacific Goodrich Rubber Company filed with Nat Rogan, the then Collector of Internal Revenue for the Sixth District of California, an amended claim for refund dated March 30, 1936, of the same tax and interest as that the refund of which was claimed in their original claims for refund described in paragraph XVIII above. That each of said amended claims for refund alleged the same grounds for its allowance as those alleged in the original claims for refund, and each alleged in addition the further reason for its allowance that the taxpayer did not include the tax, the refund of which was claimed; in the price of the articles on which said tax was imposed, nor did it collect the amount of said tax from the persons to whom said articles were sold. [116]

XX.

That on May 22, 1936 the Commissioner of Internal Revenue by letter addressed to the plaintiff rejected in full both the original and amended claims for refund of the plaintiff on the ground that there

was on file in his office a claim filed by the Pacific Goodrich Rubber Company for refund of the same tax, based on the same contentions, and that the plaintiff's claims were therefore duplicate claims. That on April 8, 1936, the Commissioner of Internal Revenue rejected the original claim for refund of the Pacific Goodrich Rubber Company, and on May 22, 1936, by letter addressed to the Pacific Goodrich Rubber Company said Commissioner rejected in full the amended claim for refund of said company. That said rejections of the claims of the Pacific Goodrich Rubber Company were made on the grounds that the proper interpretation of Sec. 9 (a) of the Agricultural Adjustment Act did not entitle said company to a credit for the floor stocks tax paid on the cotton contents of tires in computing the manufacturer's excise tax. That neither the whole or any part of said additional manufacturer's excise tax and interest in the aggregate sum of \$16,450.39, which was paid by the Pacific Goodrich Rubber Company under protest as aforesaid, has been repaid or refunded to the plaintiff or to the Pacific Goodrich Rubber Company, and no other action than the filing of said claims for refund and the bringing of this action has been brought or taken by the plaintiff or the Pacific Goodrich Rubber Company for the recovery of said tax and interest.

XXI.

That on July 8, 1936, the plaintiff filed with the Collector of Internal Revenue at Akron, Ohio, a

claim for abatement of certain taxes and interest having no relation to the taxes and interest involved in this proceeding, but in which the plaintiff described itself as the successor to the Pacific Goodrich Rubber Company, and in which it made the statement that Pacific Goodrich Rubber Company transferred its assets to The B. F. Goodrich Company on or about June [117]-30, 1934, and was dissolved December 31, 1934.

XXII.

That throughout the period from August 1, 1933, to April 10, 1934, the Pacific Goodrich Rubber Company was informed and believed that, for the purpose of computing the manufacturer's excise tax on tires manufactured and sold by it, it was entitled under the provisions of Sec. 9 (a) of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either under Sec. 9 (a) or Sec. 16 of the Agricultural Adjustment Act; that Pacific Goodrich Rubber Company and plaintiff at all times prior to said April 10, 1934, believed that the tax burden with respect to such tires would amount to \$0.044184 on the processed cotton contained in said tires and 2¼ cents per pound on the remaining weight of said tires; that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled

to pay an additional manufacturer's excise tax of $2\frac{1}{4}$ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act. That all tires containing processed cotton which was held for sale or other disposition by the Pacific Goodrich Rubber Company on August 1, 1933 were sold and billed to the purchasers or vendees of the Pacific Goodrich Rubber Company long before demand was first made upon said company that it pay an additional manufacturer's excise tax of $2\frac{1}{4}$ cents per pound on the weight of the processed cotton contained in said tires, and that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them.

XXIII.

That J. C. Herbert, Secretary of the Pacific Goodrich Rubber Company, during the tax period involved herein, testified as appears [118] on pages two and three of the "Stipulation of Facts" on file herein; that George Hubbell, Assistant Treasurer of plaintiff, testified as appears on pages three, four, five, six, seven, eight, nine and ten of plaintiff's "Stipulation of Facts" on file herein.

CONCLUSIONS OF LAW

I.

That the tax imposed by Sec. 602 of the Revenue Act of 1932 on tires is a manufacturer's sales tax within the meaning of the proviso clause of Sec. 9 (a) of the Agricultural Adjustment Act; that under said Sec. 9 (a) of the Agricultural Adjustment Act the manufacturer's excise tax on tires imposed by Sec. 602 of the Revenue Act of 1932 should be computed on the basis of the weight of said tires, less the weight of the processed cotton therein on which either a processing tax imposed by Sec. 9 (a) of the Agricultural Adjustment Act or a floor stocks tax imposed by Sec. 16 (a) of said Act has been paid; that it was the intention of Congress by the use of the words "processing tax" in the proviso clause of Sec. 9 (a) of the Agricultural Adjustment Act to refer not only to the tax imposed by Sec. 9 (a) of said Act, but to the so-called floor stocks tax imposed by Sec. 16 (a) of said Act; that under Sec. 9 (a) of the Agricultural Adjustment Act the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company, was entitled to compute the manufacturer's excise tax on the tires sold by it during the period from August 1, 1933, through January 5, 1934, by deducting from the weight of said tires the weight of the processed cotton contained therein on which a floor stocks tax imposed by Sec. 16 of the Agricultural Adjustment Act had been paid.

II.

That the tax, the refund of which is sought in this action, is a manufacturer's excise tax erroneously, illegally and unjustly demanded and collected from the plaintiff's predecessor in interest, the Pacific Goodrich Rubber Company; that apart from the right of said company under the applicable revenue laws to a refund of the wrongfully demanded and collected excess taxes, it is entitled as the taxpayer to such refund under the equitable remedy of [119] money had and received.

III.

That this is not an action for the recovery of floor stocks taxes collected by the defendant under the provisions of the Agricultural Adjustment Act, and that the administrative procedure under Sec. 902 et seq. of the Revenue Act of 1936 is, therefore, inapplicable.

IV.

That the proviso clause of Sec. 9 (a) of the Agricultural Adjustment Act relating to the computation of the manufacturer's excise tax was valid and constitutional, and that it was not rendered invalid, or unconstitutional, nor was the right to a refund of the additional manufacturer's excise tax, the refund of which is sought in this action, nullified by the invalidity and unconstitutionality of other provisions of that act; that in any event the tax, the refund of which is sought in this action, is

not a floor stocks tax imposed under the Agricultural Adjustment Act, but is a manufacturer's excise tax having only an indirect relation to the levy of such floor stocks tax.

V.

That the right to the refund of the tax which is sought to be recovered in this action was not acquired by the plaintiff by reason of its ownership of all of the stock of the Pacific Goodrich Rubber Company or by the dissolution of that company or by the distribution in kind by said company of all of its assets to plaintiff, but vested in plaintiff by reason of the two written assignments executed by the Pacific Goodrich Rubber Company in favor of the plaintiff on June 30, 1934, and August 14, 1935, respectively. That said assignments to the extent that they constituted assignments of a claim against the United States were absolutely null and void ab initio under the provisions of Sec. 3477 of the Revised Statutes and the plaintiff accordingly acquired no rights thereunder to the refund of the tax herein sought to be recovered. That the plaintiff [120] also acquired no right to the refund of the tax herein sought to be recovered by reason of its ownership of all of the stock of the Pacific Goodrich Rubber Company or by dissolution of that company or by the distribution in kind by said company of all of its assets to the plaintiff.

VI.

That under Sec. 621 (d) of the Revenue Act of 1932 only "the person who paid the tax" can establish the facts required by that section to be established as a condition to the allowance of a refund of such taxes under Sec. 3220 of the Revised Statutes. That the plaintiff is not "the person who paid the tax" within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932.

VII.

That plaintiff failed to establish that the tax, the refund of which is sought by this action, was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Sec. 621 (d) of the Revenue Act of 1932.

VIII.

That plaintiff should recover nothing against defendant and that defendant should have and recover of and from the plaintiff judgment for its costs of suit herein incurred.

Let judgment be entered accordingly.

Dated: August 2nd, 1941, at 3 P. M.

PAUL J. McCORMICK,

United States District Judge.

Approved as to form.

Attorneys for plaintiff.

[Endorsed]: Filed Aug. 4, 1941. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [121]

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 8138-M Civil

THE B. F. GOODRICH COMPANY, a corpo-
ration,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on regularly for trial on February 10, 1940, plaintiff being represented by F. C. Leslie, Esquire, and Eugene H. Blanche, Esquire, and defendant being represented by the United States Attorney for the Southern Judicial District of California, through Armond Monroe Jewell, Assistant United States Attorney, and evidence having been offered to and received by the Court, and the cause ordered submitted upon the filing of briefs in behalf of each party, and the said briefs having been filed, and this Court having drawn and filed its "Conclusions of the Court on the Merits of the Action", and plaintiff, by its attorneys Newlin & Ashburn, through Ray J. Coleman, Esquire, having moved to reopen the case to admit further proof, and said motion having been opposed by defendant through its attorney above

named, and the Court having denied plaintiff's said motion to re-open the case to admit further proof, and the Court, after consideration of proposed findings of fact and conclusions of law submitted by respective attorneys and having made its findings of fact and conclusions of law, and filed the same herein.

Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed that plaintiff take nothing by its complaint, that the same be and hereby is dismissed and defendant have judgment for its costs taxed in the sum of \$20.00.

Dated: August 2nd, 1941, at 3:10 P. M.

PAUL J. McCORMICK,

United States District Judge.

Approved as to form.

.....
Attorneys for plaintiff.

Judgment entered Aug. 4, 1941.

Docketed Aug. 4, 1941.

Book C. O. 6, Page 129.

R. S. Zimmerman, Clerk.

By B. B. Hansen, Deputy.

[Endorsed]: Filed Aug. 4, 1941. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [122]

[Title of District Court and Cause.]

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing to be a full, true, and correct copy of an original Judgment entered in the above-entitled cause and recorded in C. O. Book 6—Central Division at page 129 thereof; and I do further certify that the papers hereto annexed constitute the Judgment Roll in said cause.

Attest my hand and the seal of said District Court, this Oct. 3, 1941.

R. S. ZIMMERMAN,

Clerk.

By B. B. HANSEN,

Deputy Clerk.

(Court Seal) [123]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION

RE EXHIBITS

It Is Hereby Stipulated And Agreed by and between the parties hereto by their respective attorneys, as follows:

1. That Plaintiff's Exhibit "F", being a claim for refund dated August 19, 1935, (referred to in page 6, line 9 of Transcript) is Exhibit "D" referred to in line 20, page 8 of the Stipulation of Facts in the above-entitled matter.

2. That Plaintiff's Exhibit "G", being the amended claim for refund of The B. F. Goodrich Company (line 13, page 9 of Transcript) is the exhibit referred to as Exhibit "E", line 29 page 8 of said Stipulation of Facts.

3. That Plaintiff's Exhibits "H-1" and "H-2", being letters addressed to The B. F. Goodrich Company and signed by Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner, (lines 22, 24, 25 and 26, page 9 of Transcript), and Plaintiff's Exhibit "H-3" (line 2, page 10 of Transcript) is Exhibit "F" referred to in line 6, page 9 of said Stipulation of Facts.

Dated: March 9th, 1940.

EUGENE H. BLANCHE,
F. C. LESLIE,

Attorneys for Plaintiff.

BEN HARRISON,

United States Attorney,

By ARMOND MONROE JEWELL,

Assistant United States Attorney,

Attorney for Defendant.

[Endorsed]: Filed May 28, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [12:]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the above-named plaintiff, The B. F. Goodrich Com-

pany, and above-named defendant, United States of America, by and through their respective counsel, that the hearing on defendant's Demurrer, heretofore set for April 4th, 1938, may be continued to the 6th day of June, 1938, at 10 o'clock A. M., before the Honorable Paul J. McCormick.

Dated: April 4th, 1938.

ANDREWS, BLANCHE &
KLINE,

By EUGENE H. BLANCHE,
Attorneys for Plaintiff.

BEN HARRISON,

United States Attorney,

By FRANCIS C. WHELAN,

Assistant United States
Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Apr. 8, 1938. R. S. Zimmerman, Clerk By L. B. Figg, Deputy Clerk. [125]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the above-named plaintiff, The B. F. Goodrich Company, and above-named defendant, United States of America, by and through their respective counsel, that the hearing on defendant's Demurrer, here-

tofore set for June 13th, 1938, may be continued to the 19th day of Sept., 1938, at 10 o'clock A. M., before the Honorable Paul J. McCormick.

Dated: June 9th, 1938.

ANDREWS, BLANCHE &
KLINE,

By EUGENE H. BLANCHE,
Attorneys for Plaintiff.

BEN HARRISON,
United States Attorney,

By FRANCIS C. WHELAN,
Assistant United States
Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Jun. 13, 1938. R. S. Zimmerman, Clerk. By B. B. Hansen, Deputy. [126]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the above-named plaintiff, The B. F. Goodrich Company, and above-named defendant, United States of America, by and through their respective counsel, that the hearing on defendant's Demurrer, heretofore set for the 1st day of August, 1938, may be continued to the 3rd day of October, 1938, at 10

o'clock A. M., before the Honorable Paul J. McCormick.

Dated: July 28th, 1938.

ANDREWS, BLANCHE &
KLINE,

By EUGENE H. BLANCHE,
Attorneys for Plaintiff.

BEN HARRISON,
United States Attorney,

By ARMOND MONROE JEWELL,
Assistant United States
Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Aug. 1, 1938. R. S. Zimmerman, Clerk. By L. B. Figg, Deputy Clerk. [127]

[Title of District Court and Cause.]

**STIPULATION EXTENDING TIME TO FILE
DEFENDANT'S BRIEF**

It is hereby stipulated by and between the parties hereto, through their respective counsel, that defendant may have to and including June 3, 1940 within which to file its brief in the above entitled case.

Dated this 20 day of May, 1940.

EUGENE H. BLANCHE

By **EUGENE H. BLANCHE**

Attorneys for Plaintiff

BEN HARRISON

United States Attorney

EDWARD H. MITCHELL

Asst. U. S. Attorney

ARMOND MONROE JEWELL

Asst. U. S. Attorney

By **ARMOND MONROE JEWELL**

Attorneys for Defendant

It is so ordered this 28 day of May, 1940.

PAUL J. McCORMICK

Judge

[Endorsed]: Filed May 28, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [128]

[Title of District Court and Cause.]

**STIPULATION EXTENDING TIME TO FILE
PLAINTIFF'S REPLY BRIEF**

It is hereby stipulated by and between the parties hereto, through their respective counsel, that plaintiff may have to and including July 10, 1940, within which to file its reply brief in the above entitled matter.

Dated: this 11th day of June, 1940.

EUGENE H. BLANCHE

By **EUGENE H. BLANCHE**

Attorney for Plaintiff

BEN HARRISON,

United States Attorney

EDWARD H. MITCHELL,

Asst. U. S. Attorney

ARMOND MONROE JEWELL,

Asst. U. S. Attorney.

By **ARMOND MONROE JEWELL,**

Attorneys for Defendant

It is so ordered this 17th day of June, 1940.

PAUL J. McCORMICK,

Judge

[Endorsed]: Filed Jun. 17, 1940. R. S. Zimmerman, Clerk. By C. E. Hollister, Deputy Clerk. [129]

[Title of District Court and Cause.]

**STIPULATION EXTENDING TIME TO FILE
PLAINTIFF'S REPLY BRIEF**

It is hereby stipulated by and between the parties hereto, through their respective counsel, that Plaintiff may have to and including July 24th, 1940, within which to file its Reply Brief in the above entitled matter.

Dated this 9th day of July, 1940.

EUGENE H. BLANCHE,
By EUGENE H. BLANCHE,

BEN HARRISON,

United States Attorney

EDWARD H. MITCHELL,

Asst. U. S. Attorney

ARMOND MONROE JEWELL,

Asst. U. S. Attorney

By ARMOND MONROE JEWELL,

Attorneys for Defendant.

It is so ordered this 10th day of July, 1940.

PAUL J. McCORMICK,

Judge.

[Endorsed]: Filed Jul. 11, 1940. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

**MEMORANDUM OF COSTS AND
DISBURSEMENTS****Disbursements**

Marshal's Fees.....	\$
Clerk's Fees	10.00
Witness' Fees	
Attorney's Docket Fees (Sec. 824	
R. S.) (Sec. 571-2 Title 28	
U. S. C.).....	10.00

\$20.00

Taxed J.M.H.

United States of America,
Southern District of California,
City of Los Angeles—ss.

Armond Monroe Jewell, being duly sworn, deposes and says: that he is one of the attorneys for Defendant in the above entitled cause, and as such has knowledge of the facts relative to the above costs and disbursements; that the items in the above memorandum contained are correct; that said disbursements have been necessarily incurred in said cause; and that the services charged herein have been actually and necessarily performed as herein stated.

(Seal)

ARMOND MONROE JEWELL,
Assistant United States Attorney

Subscribed and sworn to before me, this 8th day of August, A. D. 1941.

R. S. ZIMMERMAN,

Clerk,

U. S. District Court, Southern
District of California

By J. M. HORN,

Deputy. [131]

To Newlin and Ashburn

You will please take notice that on Monday the 11th day of August, A. D. 1941, at the hour of 9:00 o'clock A. M., defendant will apply to the Clerk of said Court to have the within memorandum of costs and disbursements taxed pursuant to the rule of said Court, in such case made and provided.

ARMOND MONROE JEWELL,

Assistant United States Attorney

Service of within memorandum of costs and disbursements, and receipt of a copy thereof acknowledged this day of, A. D. 193

.....
Attorney for

[Endorsed]: Filed Aug. 8, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [132]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California—ss.

Lois Hamby, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 600 Federal Building, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on August 8, 1941 she deposited in the United States Mails in the Post Office at Temple and Main Streets, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of Memorandum of Costs and Disbursements addressed to Newlin & Ashburn, 1020 Edison Building, Los Angeles, California, at which place there is a delivery service by United States Mail from said post office.

LOIS HAMBY

Subscribed and sworn to before me, this 8th day of August, 1941.

R. S. ZIMMERMAN,

Clerk,

U. S. District Court, Southern
District of California

By **J. M. HORN,**

(Court Seal) Deputy.

[Endorsed]: Filed Aug. 8, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy Clerk. [133]

[Title of District Court and Cause.]

NOTICE OF APPEAL.

Notice is hereby given that The B. F. Goodrich Company, a corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 4, 1941.

Dated: November 3, 1941.

**NEWLIN & ASHBURN
RAY J. COLEMAN**

Attorneys for Plaintiff
1020 Edison Building,
Los Angeles, Calif.

[Endorsed]: Copy mailed to U. S. Atty. E. L. S. Filed Nov. 3, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [134]

[Title of District Court and Cause.]

STIPULATION IN RE RECORD ON APPEAL

Whereas, the parties hereto have agreed that more than forty days will be required to prepare and file the record on appeal in the above entitled cause; and

Whereas, the plaintiff in the above entitled action has heretofore duly and regularly taken and perfected an appeal from the judgment heretofore made and entered herein in favor of defendant and against plaintiff;

Now, therefore, it is hereby stipulated that the time of said plaintiff and appellant to take steps for the preparation of a record on appeal in accordance with Rule 75 of the Rules of Civil Procedure may be by order of this court extended to and including the 15th day of January, 1942, and the time of said defendant and appellant to file the record on appeal and to docket said action on appeal may be by order of this court extended to [136] and including the 25th day of January, 1942.

Dated, this 29th day of November, 1941.

WILLIAM FLEET PALMER,
United States Attorney

ARMOND MONROE JEWELL,
Assistant United States Attorney

By ARMOND MONROE JEWELL,
Attorneys for Defendant and
Respondent

NEWLIN & ASHBURN,
By WILLIAM J. CURRER, JR.,
Attorneys for Plaintiff and
Appellant

It is hereby ordered that the time of appellant The B. F. Goodrich Company, a corporation, to commence the preparation of a record on appeal is hereby extended to and including January 15, 1942, and its time to file the record on appeal and to docket said action on appeal is hereby extended to and including January 25, 1942, in accordance with the foregoing stipulation.

Dated, November 29th, 1941.

PAUL J. McCORMICK,

District Judge

[Endorsed]: Filed Nov. 29, 1941. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy. [137]

[Title of District Court and Cause.]

Know All Men by These Presents:

That we, The B. F. Goodrich Company, a corporation, as Principal, and American Surety Company of New York, a corporation under the laws of the State of New York, as Surety, are held and firmly bound unto the United States of America, in the full and just sum of Two Hundred Fifty and no/100 Dollars (\$250.00) to be paid to the United States of America, or its certain attorney, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of November, in the year of our Lord One Thousand Nine Hundred and Forty-one.

Whereas, lately at the District Court of the United States for the Southern District of California, Central Division, in a suit pending in said Court between The B. F. Goodrich Company, a corporation, Plaintiff, versus the United States of

America, Defendant, a judgment was rendered against the said The B. F. Goodrich Company, a corporation, and the said The B. F. Goodrich Company, a corporation, having filed a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the aforesaid suit.

Now, the condition of the above obligation is such, that if the said The B. F. Goodrich Company, a corporation, shall prosecute its appeal to effect, and answer all costs if it fails to make its plea good, or if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

THE B. F. GOODRICH COMPANY

By G. W. HUBBELL

Asst. Treas.

**AMERICAN SURETY COMPANY
OF NEW YORK**

By A. E. KRULL

Resident Vice President

Attest:

I. TAYLOR

Resident Assistant Secretary

Examined and recommended for approval as provided by Rule 13.

RAY J. COLEMAN

Attorney [138]

State of California,
County of Los Angeles—ss.

On this 3d day of November, A. D. 1941, before me, Lucile M. Chesley, a Notary Public in and for Los Angeles County, State of California, residing therein, duly commissioned and sworn, personally appeared A. E. Krull personally known to me to be the Resident Vice-President and I. Taylor, personally known to me to be the Resident Assistant Secretary of the American Surety Company of New York, the Corporation described in and that executed the within instrument, and known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Seal)

LUCILE M. CHESLEY

Notary Public in and for the County of Los Angeles,
State of California.

My Commission expires April 16, 1945.

[Endorsed]: Filed Nov. 3, 1941. R. S. Zimmerman, Clerk. By J. M. Horn, Deputy. [139]

[Title of District Court and Cause.]

**APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL**

Now comes The B. F. Goodrich Company, a corporation, the plaintiff and appellant herein, and designates for inclusion in the record to be filed in the Circuit Court of Appeals for the Ninth Circuit pursuant to the appeal taken in the above entitled action, the complete record and all the proceedings and evidence in said action including the following:

1. Petition filed herein on October 1, 1937.
2. Affidavit of service of petition by mailing, filed herein on October 6, 1937.
3. Affidavit of service of petition, filed herein on October 6, 1937.
4. Demurrer filed herein on December 3, 1937.
5. Amendment to demurrer, filed herein on April 6, 1938.
6. Amendment to petition, filed herein on May 21, 1938. [140]
7. Order that petition be amended as set forth in the aforementioned amendment to petition, said order being filed herein on May 21, 1938.
8. Second amendment to demurrer, filed herein on August 1, 1938.
9. Notice of motion for order sustaining demurrer, filed herein on August 8, 1938.

10. Minute order overruling demurrer, made on or about October 3, 1938.

11. Answer filed herein on February 3, 1939.

12. Affidavit of service of answer by mail, filed herein on February 3, 1939.

13. First amended petition, filed herein on February 5, 1940.

14. Stipulation as to filing first amended petition by plaintiff and that answer of defendant to petition as amended be the answer to the first amended petition, said stipulation being filed herein on February 5, 1940.

15. Substitution of attorneys, filed herein on February 10, 1940.

16. Stipulation of facts, filed herein on February 10, 1940.

17. Minute order submitting cause for decision on briefs, made on or about February 10, 1940.

18. Conclusions of the court on the merits of the action, filed herein on December 31, 1940.

19. Minute order on decision of action on the merits, filed herein on December 31, 1940.

20. Substitution of attorneys, filed herein on February 3, 1941.

21. Notice of motion to reopen case to admit further proof, together with the memorandum of authorities and the [141] affidavits attached thereto, said notice of motion being filed herein on February 3, 1941.

22. Affidavit of Armond Monroe Jewell in opposition to motion to reopen, filed herein on April 14, 1941.

23. Minute order denying motion to reopen, filed herein on April 15, 1941.

24. Findings of fact and conclusions of law dated August 2, 1941, and filed herein on August 4, 1941.

25. Judgment dated August 2, 1941, and filed herein on August 4, 1941.

26. Certificate dated October 3, 1941, of B. B. Hansen, Deputy Clerk of the above entitled court, certifying to the judgment and to the contents of the judgment roll.

27. All of the plaintiff's exhibits, consisting of Exhibits A, B, C, D, E, F, G, H-1, H-2, H-3, I, I-1 and J.

28. All of defendant's exhibits, consisting of Exhibits Nos. 1, 2, 3 and 4.

29. Reporter's transcript, two copies of which are filed herewith. The original was filed with the above entitled court on or about February 20, 1940, and at that time a copy was also furnished to defendant's counsel.

30. Supplemental stipulation re exhibits, filed herein on May 28, 1940.

31. Brief of plaintiff, defendant's reply brief and plaintiff's reply brief, all of which were filed with the above entitled court and all of which are deemed necessary for the proper presentation of the points on which appellant

intends to rely for the following reasons: (1) Pursuant to stipulation of counsel in open court (Rep. Tr. p. 6) that certain objections to stipulated testimony might be made in said briefs, counsel for de- [142] fendant at page 14 of defendant's reply brief objected to portions of this testimony and this objection was erroneously sustained by the court on page 12 of its conclusions of the court on the merits of the action. (2) One of the grounds urged by plaintiff and appellant for the granting of the motion to reopen was that the further evidence sought to be introduced related in part to defenses which the plaintiff with good cause did not anticipate, since they were not urged by the Commissioner of Internal Revenue in advance of trial or by the defendant at time of trial and were first advanced by the court itself after the trial had been concluded and the briefs of both parties submitted. Said briefs, together with the reporter's transcript, must therefore be reviewed by the Appellate Court to determine what defenses were urged by the defendant and what defenses were first advanced by the court itself after the trial had been concluded and the briefs of both parties submitted.

32. Stipulation continuing hearing on demurrer, filed herein on April 8, 1938.

33. Stipulation continuing hearing on demurrer, filed herein on June 13, 1938.

34. Stipulation continuing hearing on demurrer, filed herein on August 1, 1938.

35. Stipulation extending time to file defendant's brief, filed herein on May 28, 1940.

36. Stipulation extending time to file plaintiff's reply brief, filed herein on June 17, 1940.

37. Stipulation extending time to file plaintiff's reply brief, filed herein on July 11, 1940.

38. Memorandum of costs and disbursements, filed herein on August 8, 1941.

39. Affidavit of service by mail of cost bill, filed herein on August 8, 1941. [143]

40. Notice of appeal filed herein on November 3, 1941.

41. Stipulation in re record on appeal together with the order of the court dated November 29, 1941, extending the time to file the record on appeal and to docket this action, said stipulation and order being filed herein on November 29, 1941.

42. Bond for costs on appeal.

43. This designation of the contents of record on appeal.

Said transcript is to be prepared by the clerk of this court as required by law and the rules of this court and the Federal Rules of Civil Procedure, and to be filed in the office of the clerk of the Circuit Court of Appeals for the Ninth Circuit and this action there docketed on or before the 25th day of January, 1942, pursuant to the order of the

above entitled court made herein on the 29th day of November, 1941, extending the time within which to file the record on appeal and to docket this action.

Dated, this 14th day of January, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Attorneys for The B. F. Goodrich Company,
plaintiff and appellant

[Endorsed]: Received copy of the within Designation this 14 day of Jan. 1942. A. M. Jewell, Asst. U. S. Atty., Attorney for Deft. Filed Jan. 14, 1942.

[Endorsed]: Filed Jan. 14, 1942. [144]

[Title of District Court and Cause.]

**STIPULATION AND ORDER EXTENDING
TIME TO FILE RECORD ON APPEAL
AND DOCKET ACTION**

This court, upon the stipulation of counsel for plaintiff and defendant, having heretofore made its order herein extending the time to commence the preparation of the record on appeal to and including January 15, 1942, and extending the time to file the record on appeal and to docket this action in the Appellate Court to and including January 25, 1942; and

The plaintiff and appellant, The B. F. Goodrich

Company, a corporation, having filed with the clerk of this court on January 14, 1942, its designation of contents of record on appeal; and

The clerk of this court having advised counsel for plaintiff and appellant that he will not be able to prepare the transcript of the record on appeal in time to have the same filed in the Appellate Court before the expiration of the period for filing and docketing as extended by the aforementioned order of this court; [146]

Now, therefore, it is hereby stipulated by and between counsel for plaintiff and defendant above named, that the time of plaintiff and appellant for filing the record on appeal and for docketing this action in the Circuit Court of Appeals for the Ninth Circuit may be, by order of this court, extended to and including the 31st day of January, 1942.

Dated this 21 day of January, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Attorneys for Plaintiff and Appellant, The B. F. Goodrich Company.

WILLIAM FLEET PALMER.

United States Attorney,

ARMOND MONROE JEWELL,

Assistant United States Attorney,

By **ARMOND MONROE JEWELL**

Attorneys for defendant and Respondent, United States of America.

Upon the foregoing stipulation of counsel for plaintiff and defendant in the above entitled cause, and good cause appearing therefor,

It is hereby ordered that the time of the plaintiff and appellant for filing the record on appeal and for docketing this action in the Appellate Court be and it hereby is extended to and including the 31st day of January, 1942.

Dated: this 22nd day of January, 1942.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Jan. 22, 1942. [147]

[Title of District Court and Cause.]

ORDER THAT ORIGINAL PAPERS AND EXHIBITS BE SENT TO APPELLATE COURT

It being the opinion of this court that upon the appeal of this action to the Circuit Court of Appeals for the Ninth Circuit, it is desirable that certain original papers and exhibits should be sent to said Appellate Court in lieu of copies thereof.

Now, therefore, it is hereby ordered that the following listed original papers and exhibits, which are designated in items 27, 28 and 31 of appellant's designation of contents of record on appeal filed herein on January 14, 1942, be transmitted, in lieu of copies, by the clerk of this court to the clerk of the Circuit Court of Appeals for the Ninth Cir-

cuit to be by him safely kept and returned to the clerk of this court after the disposition of said appeal:

1. All of plaintiff's exhibits consisting of Exhibits "A", "B", "C", "D", "E", "F", "G", "H-1", "H-2", "H-3", "I", "I-1" and "J"; [149]

2. All of defendant's exhibits consisting of Exhibits Nos. 1, 2, 3 and 4;

3. Briefs as described in Item 31 of appellant's designation of contents of record on appeal filed herein on January 14, 1942.

Dated this 22nd day of January, 1942.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Jan. 22, 1942. [150]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 151 inclusive contain full, true and correct copies of Petition; Affidavit of Service of Petition by Mail; Affidavit of Service of Petition; Demurrer; Amendment to Demurrer; Amendment to Petition; Order for Amendment of Petition; Second Amendment to Demurrer; Notice

of Motion for Order Sustaining Demurrer; Order Overruling Demurrer; Answer to Petition; Affidavit of Service of Answer; First Amended Petition; Stipulation as to Filing First Amended Petition and re Answer thereto; Substitution of Attorneys filed Feb. 10, 1940; Stipulation of Facts; Order Submitting Cause; Conclusions of Court on Merits; Order for Findings and Judgment; Substitution of Attorneys filed Feb. 3, 1941; Notice of Motion to Reopen Case and Memorandum of Authorities and Three Affidavits Annexed thereto; Affidavit of Armond Monroe Jewell in Opposition to Motion to Reopen; Order Denying Motion to Reopen; Findings of Fact and Conclusions of Law; Judgment; Certificate of Clerk to Judgment Roll; Supplemental Stipulation re Exhibits; Three Stipulations Extending Time to File Briefs; Three Stipulations Continuing Hearing on Demurrer; Memorandum of Costs and Disbursements; Affidavit of Service of Cost Bill; Notice of Appeal; Bond for Costs on Appeal; Designation of Record on Appeal; Two Stipulations and Orders Extending Time to Docket Appeal; Order for Transmittal of Original Briefs and Exhibits, which together with the Reporter's Transcript of Testimony and Proceedings, the Brief of Plaintiff, Defendant's Reply Brief, Plaintiff's Reply Brief and the Original Exhibits transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk for

comparing, correcting and certifying the foregoing record amount to \$26.95, which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 29th day of January, A. D. 1942.

(Seal)

R. S. ZIMMERMAN,

Clerk,

By: EDMUND L. SMITH,

Deputy.

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY

Appearances:

For the Plaintiff:

EUGENE H. BLANCHE, Esq.,

1117 Transamerica Building,

Los Angeles, California; and

F. C. LESLIE, Esq.,

For the Defendant:

BEN. HARRISON,

United States Attorney; and

ARMOND MONROE JEWELL,

Assistant United States Attorney.

Los Angeles, California

Saturday, February 10, 1940—10:05 o'clock A. M.

The Court: Proceed.

The Clerk: No. 8138, The B. F. Goodrich Company versus the United States, for trial.

Mr. Jewell: Ready, your Honor.

Mr. Blanche: Ready.

The Court: Proceed.

Mr. Blanche: At this time, if the Court please, I wish to file a substitution of attorneys, substituting Eugene H. Blanche in lieu and instead of Messrs. Andrews, Blanche & Kline.

The Court: So ordered.

Mr. Blanche: Substitution has been served upon counsel for the Government.

I wish also at this time to associate in the trial of this matter, in behalf of The B. F. Goodrich Company, Mr. F. C. Leslie.

The Court: Mr. Leslie is a member of the bar of an outside jurisdiction——

Mr. Blanche: Mr. Leslie is a member of the bar of Ohio and Tennessee in the Sixth and Seventh Circuit and of the United States Supreme Court.

The Court: He is merely appearing in this case, and not permanently.

Mr. Blanche: Yes, he is. He did appear once before under the same conditions in an argument on a demurrer.

The Court: Very well.

Mr. Blanche: I may say that in this matter we have reduced practically every question to an agreed stipulation. There are one or two exceptions to that, and we will make that clear as we proceed.

It had been the thought of counsel that this matter be submitted on brief, probably 20, 20 and 10, and if your Honor wishes, at this time we are pre-

pared to make a brief opening statement of the situation, the contentions of the plaintiff and of the law involved.

The Court: I think it would be well to do that.

Mr. Blanche: Very well.

Mr. Leslie: If the Court please, this action is one for the recovery of additional manufacturers excise tax paid by the Pacific Goodrich Company in 1934. The original petition was filed in 1937, and a demurrer was filed on behalf of the Government. We argued that demurrer before your Honor, and that was overruled in October 1938.

The question raised by that demurrer was whether or not the tax sought to be recovered here was really an agriculture adjustment tax, namely, a floor stock or processing tax, rather than a manufacturing excise tax.

The question involved here is a construction of Section 9 (b) of the Agricultural Adjustment Act. Your Honor will probably recall the Revenue Act of 1932 assessed a manufacturers' excise tax on tires of $2\frac{1}{4}$ cents per pound.

In 1933, when the Agricultural Adjustment Act was passed, Section 9 (b) of that act provided for a credit to manufacturers of tires on the manufacturers' excise tax for the amount of cotton going into the tires upon which a processing tax had been paid.

The language of that Act is as follows:

“Provides: That any article upon which a manufacturers' sales tax is levied under the

authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight"—and that is true in the tires—"such manufacturers' sales tax shall be computed on the basis of the weight of such finished article, less the weight of the processed cotton contained therein on which a processing tax has been paid."

Your Honor will possibly also recall that the Agricultural Adjustment Act levied three types of taxes, or three divisions of taxes, all generally grouped under the processing tax.

First, was the tax which was to be paid on the processing of cotton after August 1, 1933, that being the effective date of the act.

Secondly, a floor stock tax which was to be paid at the same rate and on the same commodities but on the inventory on hand as of August 1, 1933.

Now, that second tax is commonly referred to by the Commissioner's office and by taxpayers as a floor stock tax.

The question involved is whether or not the words "processing tax," as used in the section which I just read to your Honor, includes floor stock tax as well as processing tax.

We contend that it must, otherwise there is such a discrimination there that Congress couldn't have intended anything other than that.

That is our contention.

Mr. Jewell: In addition to the contention referred to by counsel for the plaintiff, as to the

fact that the Government contends that the words "processing tax," giving that construction, do not include floor stock taxes, there is also another contention on the part of the Government, and that is that this is really an action for the recovery of taxes paid under the Agricultural Adjustment Act, and that the plaintiff has not conformed with the rules and regulations laid down by the statute in a suit for such a refund.

The Court: Proceed.

Mr. Blanche: If it please the Court, at this time I propose to offer a stipulation of facts in this matter which has been signed by counsel for the Government and counsel for the petitioner, the plaintiff.

By stipulation of counsel for the Government, there will be no question of a foundation raised. However, there may be raised, either at this time, or at the time of the filing of the brief, a question regarding, or questions regarding, the materiality of the facts stipulated to, the relevancy of the facts stipulated to and of the sufficiency of the proof made.

We appreciate that the latter may always be raised, but in order that there be no misunderstanding we make that statement.

The latter sufficiency of the proof made particularly pertains to the question of whether the tax was passed on to the consumer or whether the tax was subsequently billed by the consumer after the tax was assessed and levied.

It is our contention, of course, that inasmuch as the tax was not levied until some four months after the return, we were not apprised of it, we did not include it in the price of the commodity, and there is a statement to the effect that it was not covered with subsequent billing.

This stipulation, if the Court please, takes two forms. The first form is a stipulation as to ultimate facts, these having to do with items that are not denied in the first amended petition. The second takes the form that if two particular witnesses were called they would testify as set forth in the stipulation.

Is that a correct statement, Mr. Jewell—

Mr. Jewell: That is a correct statement.

The Court: I suppose that the stipulation that they would so testify is also made subject to the materiality and relevancy of that evidence.

Mr. Blanche: Yes, your Honor.

I do not believe it is in order to make this as an exhibit; I therefore offer it in evidence.

The Court: It may be filed.

Mr. Blanche: As a part of the pleadings—

The Court: Yes.

(The stipulation referred to was filed as a part of the pleadings.) ●

Mr. Blanche: We have a series of exhibits, if the Court please.

We will pass by Exhibit A for the reason that it arrived this morning from Akron and is being photostated. The original has not as yet been ex-

hibited to counsel for the Government, but it will be forwarded here as soon as we can photostat it. Therefore, I ask that the assignment dated June 30, 1934, from Pacific Goodrich Rubber Company to The B. F. Goodrich Company be introduced in evidence and marked as Plaintiff's Exhibit A. This will be furnished before adjournment of Court.

The Court: So ordered.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit A.")

PLAINTIFF'S EXHIBIT A

ASSIGNMENT

Know all men by these presents that Pacific Goodrich Rubber Company, a corporation duly organized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank

accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

To have and to hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

And said Pacific Goodrich Rubber Company does hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

In witness whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal

to be affixed hereto by its President and Secretary
as of the 30th day of June, 1934.

**PACIFIC GOODRICH RUBBER
COMPANY**

By **J. D. TEW**
President

Attest:

S. M. JETT
Secretary

State of Ohio,
County of Summit—ss.

Before me, a Notary Public in and for said county, personally appeared **J. D. Tew**, President and **S. M. Jett**, Secretary of Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said The Pacific Goodrich Rubber Company.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio, this 30th day of June, 1934.

ALBERTA H. TEWERS
Notary Public

My commission expires Dec. 15, 1935.

• Mr. Blanche: I next offer in evidence an assignment dated August 14, 1935, from Pacific Goodrich Rubber Company to The B. F. Goodrich Company, the same being marked Exhibit B.

I may say, if the Court please, that copies of all of these exhibits, with the exception of Exhibit A which I have referred to, has already been furnished to, or examined by, counsel for the Government.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit B.")

PLAINTIFF'S EXHIBIT B

• For value received, the undersigned, Pacific Goodrich Rubber Company, does hereby sell, assign and transfer unto The B. F. Goodrich Company, all claims, demands, choses in action or cause or causes of action of whatsoever kind and nature which it has or which may later accrue against all persons whomsoever, particularly its claim for refund of excise tax illegally paid to the United States Government from and after April 17, 1934, in the sum of \$16,450.39, or any one sum finally found to be due, together with interest thereon.

• The assignor does by these presents, hereby nominate, constitute and appoint the said The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of the undersigned, to claim, demand payment and/or collect all such claims and amounts and

particularly, said claim for excise tax illegally paid to the United States Government, and otherwise to prosecute any and all proceedings at law or in equity therefor and to take such other action as may be necessary or appropriate to settle, compromise and/or collect said claim or claims, and further, to give effectual discharge of said claim or claims.

In witness whereof, the undersigned has hereunto attached its hand and seal this the 14th day of August, 1935.

**PACIFIC GOODRICH RUBBER
COMPANY**

By J. D. TEW
President

By S. M. JETT
Secretary
F. C. LESLIE
F. M. SEIFERT

State of Ohio,
County of Summit—ss.

Before me, a Notary Public in and for said county, personally appeared J. D. Tew, President, and S. M. Jett, Secretary of the Pacific Goodrich Rubber Company, the corporation which executed the foregoing instrument, who acknowledged that the seal affixed to said instrument is the corporate seal of said corporation; that they did sign and seal said instrument as such President and Secretary in behalf of said corporation and by authority of its

board of directors; and that said instrument is their free act and deed individually and as such President and Secretary and the free and corporate act and deed of said the Pacific Goodrich Rubber Company.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal at Akron, Ohio this 14th day of August, 1935.

ALBERTA M. TEWERS

Notary Public

My Commission expires Dec. 15, 1935.

Mr. Blanche: We next offer in evidence Plaintiff's Exhibit C, demand on Form 728 from the United States of America, addressed to Pacific Goodrich Rubber Company, for the sum of \$15,880.64, plus interest of \$569.74.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit C.")

Payment of additional tax for 1933 under protest.

MANUFACTURER'S EXCISE TAXES

CHARACTER OF TAX	RATE	AMOUNT OF TAX
1. Tax on the manufacture of goods, wares, and merchandise, in the United States, for the purpose of exportation, in the form of a tax on the value of the goods, wares, and merchandise, at the time of exportation.	1%	15,880.64
2. Tax on the manufacture of goods, wares, and merchandise, in the United States, for the purpose of exportation, in the form of a tax on the value of the goods, wares, and merchandise, at the time of exportation.	1%	15,880.64
3. Tax on the manufacture of goods, wares, and merchandise, in the United States, for the purpose of exportation, in the form of a tax on the value of the goods, wares, and merchandise, at the time of exportation.	1%	15,880.64
4. Tax on the manufacture of goods, wares, and merchandise, in the United States, for the purpose of exportation, in the form of a tax on the value of the goods, wares, and merchandise, at the time of exportation.	1%	15,880.64
5. Tax on the manufacture of goods, wares, and merchandise, in the United States, for the purpose of exportation, in the form of a tax on the value of the goods, wares, and merchandise, at the time of exportation.	1%	15,880.64
6. Tax on the manufacture of goods, wares, and merchandise, in the United States, for the purpose of exportation, in the form of a tax on the value of the goods, wares, and merchandise, at the time of exportation.	1%	15,880.64
7. Tax on the manufacture of goods, wares, and merchandise, in the United States, for the purpose of exportation, in the form of a tax on the value of the goods, wares, and merchandise, at the time of exportation.	1%	15,880.64
8. Tax on the manufacture of goods, wares, and merchandise, in the United States, for the purpose of exportation, in the form of a tax on the value of the goods, wares, and merchandise, at the time of exportation.	1%	15,880.64
9. Tax on the manufacture of goods, wares, and merchandise, in the United States, for the purpose of exportation, in the form of a tax on the value of the goods, wares, and merchandise, at the time of exportation.	1%	15,880.64
10. Tax on the manufacture of goods, wares, and merchandise, in the United States, for the purpose of exportation, in the form of a tax on the value of the goods, wares, and merchandise, at the time of exportation.	1%	15,880.64

Total liability: 15,880.64

Less credit for the month of April 1933: 15,880.64

Amount due: 0.00

Signature: *[Signature]*

Date: April 30, 1934

For the calendar month of April 1933, and for the amount of the credit, I declare that the amount of the credit is correct and admissible.

Signature: *[Signature]*

Date: April 30, 1934

Sworn to and subscribed before me on the day of April 1934.

Notary Public for the State of California: *[Signature]*

Commission Expires: *[Signature]*

Name: Pacific Goodrich Rubber Co.
 10521
 P.O. Box 10521
 City and State: Los Angeles, Calif.
 Excise tax - \$62.50

ORIGINAL RETURN - This form must be returned to the Collector of Internal Revenue.

PLAINTIFF'S EXHIBIT C

For the month of April 1934

April 30, 1934

Pacific Goodrich Rubber Co.
 (Name)
 Los Angeles, Calif.
 add (Address)

Schedule of taxes, penalties, and interest for the several months covered by the attached return.

Month	Tax Due	Tax Paid	Additional Tax	2% Penalty	Over-payment	Interest
1933						
Nov	9439.10				329.59	376.32
Dec	6447.54				193.43	2.64
	15,880.64				529.72	

Interest computed to include April 30, 1934.

+ 329.59
 + 193.43
 + 2.64
 Total due: 529.72

529.72
 529.72

 0.00

2-6

Mr. Blanche: We next offer in evidence, as Plaintiff's Exhibit D, claim for refund of Pacific Goodrich Rubber Company bearing date of August 19, 1935.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit D.")

PLAINTIFF'S EXHIBIT D

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Received Aug. 31, 1935. Collector Internal Revenue, Los Angeles, Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ Refund of Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—Pacific Goodrich Rubber Company.

Business address—5400 E. Ninth St., Los Angeles, Calif.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, Calif.
2. Period (if for income tax, make separate form for each taxable year) from, 19..., to, 19....
3. Character of assessment or tax—Excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17; July 27, 1934.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded—\$16,450.39 plus interest.
7. Amount to be abated (not applicable to income or estate taxes)—\$
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H. R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this Section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the Commissioner's construction of Section 9 of the

Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

Signed **PACIFIC GOODRICH RUBBER
COMPANY**

By **S. M. JETT**

Assistant Secretary

(Seal)

Sworn to and subscribed before me this 19 day of
August, 1935.

RUTH REES,

Notary Public

My Commission Expires Aug. 27, 1935.

(See Instructions on Reverse Side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: Pacific Southern Paper Co.

Character of assessment and period covered	Line	Year	Month	Account No. on		Amount assessed	Paid, Assessed, or Credited		Pd. Am. Cr.	Claim No.
				Page	Line		Date	Amount		
1935	1	1935	1	1042	1	16,450.39	4/1/35	16,450.39	1641	
						569.75	7/1/35	569.75	1641	
Total, \$ 16,450.39										

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state
						Serial number

Previous Claim
See Ch. No. _____

REFUND

Kat Rogers
Collector of Internal Revenue

COMMITTEE ON CLAIMS

ST 31017

ST 31017

Amount claimed \$ 16,450.39
Amount allowed \$ _____
Amount rejected \$ 16,450.39

INSTRUCTIONS

- The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
- The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the documents specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
- If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
- When the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of an officer having authority to sign for the corporation.

Mr. Blanche: After the stipulation was prepared, your Honor, there were some changes in the letters of the exhibits, and possibly we may not be exactly correct in them, but we will furnish the Court, in the brief to be filed, a correct designation of those exhibits.

We next offer in evidence, as Plaintiff's Exhibit E, amended claim for refund of Pacific Goodrich Rubber Company, in the amount of \$16,450.39, being the same amount as that demanded in the original claim for refund.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit E.")

PLAINTIFF'S EXHIBIT E .

AMENDED CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Received Apr. 21, 1936. Coll. Int. Rev., Los Angeles, Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ Refund of Tax Illegally Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps—Pacific Goodrich Rubber Company.

Business address—5400 E. Ninth Street, Los Angeles, California.

Residence—

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California.
2. Period (if for income tax, make separate form for each taxable year) from, 19..., to, 19....

3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17; July 27, 1934.
5. Date stamps were purchased from the Government
6. Amount to be refunded \$16,450.39 plus interest.
7. Amount to be abated (not applicable to income or estate taxes) \$
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the Sixth District of Calif., a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section 602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires

upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that "processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agri-

cultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

Signed **PACIFIC GOODRICH RUBBER
COMPANY**

By **S. M. JETT**

(Seal)

Sworn to and subscribed before me this 30th day
of March, 1936.

ALBERTA M. TEWERS
Notary Public

(See Instructions on Reverse Side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period	Assessment	Payment	Refund	Amount	Period	Amount	Period	Amount	Period
Int.	1934	Apr	1052 1	15,880 64	6/19/34	15,880 64	Pd		
				4 569 75	7/30/34	569 75	Pd		
Total				\$	Total				\$

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold on Invoice	Kind	Number	Exemption	Date of sale of stamp	Amount	Period	Amount	Period
Previous Claim								
See GI. No. R-26753								
R-31217								

Collector of Internal Revenue

COMMITTEE ON CLAIMS

Claim examined by: *fm*

Claim approved by: *fm*

City: *St. Louis*

Amount claimed: \$ 16,450.39

Amount allowed: \$

Amount rejected: \$ 6450.39

INSTRUCTIONS

- The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
- The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim sworn to by an attorney or agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by the collector, deputy collector, or internal revenue agent.
- If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the taxpayer, certified copies of the latter's testamentary, letters of administration, or other similar evidence must be annexed to the claim. If an executor, administrator, or other fiduciary files a return and thereafter a refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
- Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

11/26/66

22

Mr. Blanche: We next offer in evidence, as Plaintiff's Exhibit F, claim for refund dated August 19, 1935, filed on behalf of and by The B. F. Goodrich Company in the same amount as that specified in the Exhibits C and D, namely, \$16,450.39.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit F.")

PLAINTIFF'S EXHIBIT F

CLAIM

To be filed with the Collector where assessment
was made or tax paid

Received Aug. 31, 1935. Coll. Int. Rev. Los Angeles, Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- [x] Refund of tax illegally collected.
- [] Refund of amount paid for stamps unused, or used in error or excess.
- [] Abatement of tax assessed (not applicable to estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company.

Business address—5400 E. Ninth Street, Los Angeles, California.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on

behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California.
2. Period (if for income tax, make separate form for each taxable year) from _____, 19____ to _____, 19____.
3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17; July 27, 1934.
5. Date stamps were purchased from the Government_____.
6. Amount to be refunded—\$16,450.39 plus interest
7. Amount to be abated (not applicable to income or estate taxes)—\$_____.
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

Section 9 of the Agricultural Adjustment Act (H.R. 3835) provides: "That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturer's sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of such finished article less the weight of the processed cotton contained therein, on which a processing tax has been paid." Under the provisions of this section, the taxpayer took credit on excise tax, in the sum of \$15,880.64. The taxpayer insists that the

Commissioner's construction of Section 9 of the Agricultural Adjustment Act to the effect that taxpayer is not entitled to a credit against excise tax by reason of floor stock tax payments under which the above mentioned tax was paid, is incorrect and that a proper construction of the Section 9 of the Agricultural Adjustment Act entitles taxpayer to a credit of the amount of tax and interest above claimed.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company, to ask, demand or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

Assignment

Know all men by these presents that Pacific Goodrich Rubber Company, a corporation duly or-

ganized and existing under the laws of the State of Delaware and having its general offices at Los Angeles, California, for good and valuable considerations enuring to its benefit and herewith acknowledged, does hereby assign, transfer and set over to The B. F. Goodrich Company, a New York corporation, all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment.

To have and to hold the same unto the said The B. F. Goodrich Company, its successors and assigns forever.

Said Pacific Goodrich Rubber Company has nominated, constituted and appointed and by these presents does nominate, constitute and appoint said The B. F. Goodrich Company its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to claim, demand payment and/or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof.

And said Pacific Goodrich Rubber Company does

hereby agree that it will at any time or from time to time hereafter at the request of said The B. F. Goodrich Company make, do and execute all such further acts and instruments as may be necessary, convenient and proper to enable The B. F. Goodrich Company to recover said claims and amounts hereinabove referred to, title to which is hereby vested or intended to be vested in said The B. F. Goodrich Company.

In witness whereof, Pacific Goodrich Rubber Company has caused these presents to be signed in its name and on its behalf and its corporate seal to be affixed hereto by its President and Secretary as of the 30th day of June, 1934.

**PACIFIC GOODRICH RUBBER
COMPANY**

By (s) J. D. TEW
President

Attest:

(s) S. M. JETT
Secretary

GTK

(Signed) THE B. F. GOODRICH COMPANY
By S. M. JETT
Secretary

(Seal)

Sworn to and subscribed before me this 19 day
of August, 1935.

(Seal) RUTH REES

My Commission expires Aug. 27, 1935

(See Instructions on Reverse Side)

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Particulars of assessment and interest covered		Facts to be certified		Amount assessed		Paid, abated, or credited		P.L. Ab. I.P.	
Lat	Year	Month	Page	Line		Date	Amount		
Full tax	1934	Apr.	1052	1	\$ 15,880 00	4/19/34	\$ 15,880 00	Paid	Claim No.
Interest					569 75	7/30/34	569 75	Paid	
Refund of excess interest of \$62.52 was allowed April 22, 1935, REF: 7921									
The above assessment evidently represents rejected credits.									
Total \$					Total \$				

I certify that the records of this office show the following facts as to the purchase of stamps:

Kind	Number	Denomination	Date of sale or issue	Amount	Period commencing	Period terminating

Collector of Internal Revenue

COMMITTEE ON CLAIMS

Amount claimed \$

Amount allowed \$

Amount rejected \$

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Committee of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim sworn to by an attorney, administrator, or other fiduciary, an authenticated copy of the document specifically authorizing such agent to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by the collector, deputy collector, or internal revenue agent.

3. If the claim is filed by an individual and a refund claim is thereafter filed by a legal representative of the taxpayer, the administrator, letters of administration, or other similar evidence must be annexed to the claim. If an executor, administrator, guardian, or other fiduciary of a taxpayer files a refund claim, it is his duty to file a return for the taxpayer and to file a statement with the claim showing that the return was filed and that the taxpayer is entitled to a refund.

4. The claim must be signed by the taxpayer, or by the attorney, administrator, or other fiduciary, and must be signed with the corporate name, followed by the name and title of the signatory.

2-2

Mr. Blanche: We next offer in evidence, as Plaintiff's Exhibit G, amended claim of refund—I may say, if your Honor please, that these claims were specifically pleaded in two particulars as far as The B. F. Goodrich Company is concerned in the petition, and denied for lack of information wholly. This bears date of April 17, 1938.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit G.")

PLAINTIFF'S EXHIBIT G

AMENDED CLAIM

To be filed with the Collector where assessment
was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund of tax illegally collected.
- ☐ Refund of amount paid for stamps unused, or used in error or excess.
- ☐ Abatement or tax assessed (not applicable to estate or income taxes).

State of Ohio;

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company.

Business address—5400 E. Ninth Street, Los Angeles, Calif.

Residence

The deponent, being duly sworn according to law,

deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—
Los Angeles, California.
2. Period (if for income tax, make separate form for each taxable year) from _____, 19____,
to _____, 19____.
3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$16,450.39; dates of payment April 17, July 27, 1934.
5. Date stamps were purchased from the Government _____.
6. Amount to be refunded—\$16,450.39 plus interest
7. Amount to be abated (not applicable to income or estate taxes)—\$_____.
8. The time within which this claim may be legally filed expires, under Section 1106 of the Revenue Act of 1932, on April 17, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

During the period from August 1, 1933 through September 30, 1933, the taxpayer manufactured and sold tires which contained some 705,806 pounds of cotton fabric in various states of manufacture, upon which it had paid to the Collector of Internal Revenue for the 6th District of California, a so-called floor tax levied by Section 16 of the Agricultural Adjustment Act, at the rate of .044184 per pound. That in computing the excise tax levied by Section

602 of the Revenue Act of 1932 upon tires manufactured and sold subsequent to August 1, 1933, taxpayer took a deduction from said excise tax in accordance with the provisions of Section 9 of the Agricultural Adjustment Act, that is, it arrived at excise tax due by deducting from the weight of the tires manufactured and sold after August 1, 1933, the weight of processed cotton in said tires, upon which a so-called floor tax had been paid under Section 16 of the Agricultural Adjustment Act. Upon an examination of taxpayer's records, the Commissioner of Internal Revenue assessed the tax above described against the taxpayer upon the theory that the provisions of Section 9 of the Agricultural Adjustment Act did not apply to articles upon which a floor stock tax had been paid under the provisions of Section 16 of said Act. The taxpayer did not include the tax herein asked to be refunded in the price of the article or articles with respect to which said tax was imposed. Neither did it collect the amount of said tax from the persons to whom the articles in question were sold. That a proper interpretation of Section 9 of the Agricultural Adjustment Act entitles the taxpayer to the credit taken by it upon its excise tax returns by reason of the payment of the so-called floor tax. The taxpayer insists that the words "processing tax" as used in Section 9 of the Agricultural Adjustment Act mean any and all taxes levied under and by the general scheme of the processing taxes and that

"processing taxes" as used throughout the Agricultural Adjustment Act mean not only the tax which accrued upon the processing of the article in question but the so-called floor tax levied in order to prevent processors from escaping or avoiding the taxes levied under said Agricultural Adjustment Act, and that Congress intended that the credit granted under said Section 9 of the Agricultural Adjustment Act should apply wherever any processing or floor stock tax had been paid.

The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter.

Under said assignment, Pacific Goodrich Rubber Company nominated and appointed The B. F. Goodrich Company, its true and lawful attorney with full power and authority in its name or in the name of Pacific Goodrich Rubber Company to ask, demand, or collect all such claims and amounts and otherwise to prosecute any proceedings at law or in equity therefor and to give effectual discharge thereof. -

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

[Form not filled in]

I certify that the records of this office show the following facts as to the purchase of stamps:

[Form not filled in]

Collector of Internal Revenue

(District)

Committee on Claims

Amount claimed \$

Amount allowed \$

Amount rejected \$

Instructions

1. The claim must be set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

Mr. Blanche: We next offer, as Plaintiff's Exhibit H, three letters. It is suggested that these be offered as one exhibit and marked H-1, H-2 and H-3.

The Court: So ordered.

The first thereof being addressed to The B. F. Goodrich Company and signed by Guy T. Helvering, Commissioner, by D. S. Bliss, Deputy Commissioner; H-2 being addressed to the [9] same named

corporation and signed by the same named persons; H-3 is a letter addressed to Pacific Goodrich Rubber Company, and signed by the same named persons as those heretofore noted.

(The documents referred to *was* received in evidence and marked "Plaintiff's Exhibits H-1, H-2 and H-3.")

PLAINTIFF'S EXHIBIT H-1

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to

MT:ST:DM

Cl. S-38677

[Date illegible]

The B. F. Goodrich Company,
5400 E. Ninth Street,
Los Angeles, California.

Gentlemen:

Reference is made to your claim for refund of \$16,450.39, representing tax and interest paid by the Pacific Goodrich Rubber Company, 5400 E. 9th Street, Los Angeles, California, under the provisions of section 602 of the Revenue Act of 1932.

It is stated that you are entitled to the refund of the above tax since the Pacific Goodrich Rubber Company sold, assigned, transferred and set over to you all its rights and claims. It is contended that the Pacific Goodrich Rubber Company erroneously paid manufacturers' excise tax in the amount claimed for the reason that floor tax was paid on the cotton content of the tires in question.

There is on file in this office a claim filed by the Pacific Goodrich Rubber Company for refund of the above tax, based on the same contentions. This claim is therefore a duplicate claim and is rejected in full.

Respectfully,

GUY T. HELVERING,

Commissioner.

By: D. S. BLISS,

Deputy Commissioner.

cc-Los Angeles, California.

PLAINTIFF'S EXHIBIT H-2

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to

MT:ST:DM

Cl. S-38676

May 22, 1936

Pacific Goodrich Rubber Company,

5400 E. Ninth Street,

Los Angeles, California.

Gentlemen:

Reference is made to your claim for refund of \$16,450.39, representing tax paid under the provisions of section 602 of the Revenue Act of 1932, for the months of November and December 1933.

The claim is based on the contention that a proper interpretation of section 9(a) of the Agricultural Adjustment Act entitles you to the credit for floor tax paid on the cotton contents of tires in computing manufacturer's excise tax due thereon. You insist that the words "processing tax" as used in this section of the Act means any and all taxes levied under the Agricultural Adjustment Act.

Under date of April 8, 1936 this office rejected your claim No. S-31017 for refund of the amount

of tax involved in this claim and based on the same contentions.

Since you have failed to furnish any new and material evidence in support of the claim, the previous action of this office is sustained and the present claim rejected in full.

Respectfully,

GUY T. HELVERING,

Commissioner.

By: D. S. BLISS,

Deputy Commissioner.

cc-Los Angeles, California.

PLAINTIFF'S EXHIBIT H-3

TREASURY DEPARTMENT

Washington

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to

MT:ST:DM

Cls: S-38676 and 38677

June 23, 1936

The B. F. Goodrich Company,
Akron, Ohio.

Attention: Mr. F. C. Leslie.

Gentlemen:

Reference is made to your letter of June 8, 1936,

requesting to be advised as to whether the claims filed by Pacific Goodrich Rubber Company, Los Angeles, California, and the B. F. Goodrich Company, Los Angeles, California, both in the amount of \$16,450.39, which were rejected in office letters dated May 22, 1936, were the claims filed with the Collector of Internal Revenue, Los Angeles, California, under date of April 17, 1936.

You are advised that the receiving stamps on the above claims indicate that they were received in the office of the Collector of Internal Revenue, Los Angeles, California, on April 21, 1936.

Respectfully,

D. S. BLISS,

Deputy Commissioner.

Mr. Blanche: We offer as Plaintiff's next exhibit, I, copy of the minutes of a special meeting of the Board of Directors of Pacific Goodrich Rubber Company, held on July 6, 1934;

We also offer as No: 1 of the last named exhibit, minutes of a special meeting of the stockholders of Pacific Goodrich Rubber Company, likewise held on Friday, July 6, 1934.

(The documents referred to *was* received in evidence and marked "Plaintiff's Exhibits I, and I-1.")

PLAINTIFF'S EXHIBIT I

The undersigned, S. M. Jett, Secretary of Pacific Goodrich Rubber Company, a Delaware Corporation, hereby certifies that the minutes attached hereto are true and correct copies of minutes of the meeting of the stockholders of that company held on July 6, 1934, and of the meetings of the Board of Directors held on July 6 and August 24, 1934, all as appears by the records of the company in his official custody.

In witness whereof, the undersigned has set his hand and affixed the seal of the corporation, this 19th day of January, 1940.

S. M. JETT

Secretary

Pacific Goodrich Rubber Company

SPECIAL MEETING OF THE BOARD OF
DIRECTORS OF PACIFIC GOODRICH
RUBBER COMPANY

Minutes of a special meeting of the Board of Directors of Pacific Goodrich Rubber Company, a Delaware corporation, held at 500 South Main Street, Akron, Ohio, Friday July 6, 1934.

There were present Messrs. J. D. Tew, S. B. Robertson, T. B. Tomkinson, S. M. Jett, representing a majority of the Board of Directors and thereby constituting a quorum for the transaction of business.

Mr. Tew, President, presided as Chairman of the meeting and Mr. Jett, Secretary, kept the minutes. The Chairman ordered the Secretary to file with the minutes of the meeting a waiver of notice and consent signed by all of the directors of the corporation.

The Chairman then announced that the meeting had been called for the purpose of formally voting on a proposal to dissolve the corporation, and upon favorable action taken thereon at this meeting, to recommend to the stockholders the dissolution of the corporation. He stated that, as known to all of the directors present, the possession of all property and assets of the corporation had been delivered over to The B. F. Goodrich Company as the owner of all of the stock of the corporation at the close of business on June 30, 1934, but that this meeting had been called to ratify such action on the part of the management according to law.

Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved: that in the judgment of this Board of Directors it is advisable and most for the benefit of Pacific Goodrich Rubber Company that said corporation should be dissolved, and to that end and as required by law, that a meeting of the stockholders of said corporation be held at 500 South Main Street, Akron, Ohio, on the 6th day of July, 1934, at 2 o'clock in the

afternoon to take action upon this resolution, and

Be it further resolved, that this Board of Directors does hereby ratify the action taken by the management of this corporation in transferring to and delivering over possession to The B. F. Goodrich Company of all of the assets of this corporation at the close of business on June 30, 1934, as a distribution in kind to the stockholders of all the assets of this corporation, and hereby recommends the ratification and approval by the stockholders of such action on the part of the management of the corporation, and

Be it further resolved, that the Secretary of this corporation be and he hereby is directed to cause notice of the adoption of this resolution to be given to each stockholder of the corporation.

There being no further business, the meeting was on vote adjourned.

PLAINTIFF'S EXHIBIT I-1

SPECIAL MEETING OF THE STOCKHOLDERS OF PACIFIC GOODRICH RUBBER COMPANY.

Minutes of a special meeting of the stockholders of Pacific Goodrich Rubber Company, a Delaware corporation, held at 500 South Main Street, Akron, Ohio, on Friday, July 6, 1934, at 2 o'clock in the afternoon. There were present either in person or by proxy all of the stockholders of the corporation.

Mr. Tew, President, presided as Chairman of the meeting and Mr. Jett, Secretary, kept the minutes. The Chairman ordered the Secretary to file with the minutes of the meeting a Waiver of Notice and Consent signed by all of the stockholders.

The Chairman then announced that the meeting had been called for the purposes set forth in the aforesaid Waiver of Notice and Consent. Thereupon, on motion duly made and seconded, the following resolution was unanimously adopted:

Whereas, it is in the judgment of the stockholders of this corporation advisable and most for the benefit of the corporation that the corporation be dissolved, as recommended by resolution of its Board of Directors at a meeting duly called and held,

Now, therefore, be it resolved that the proper officers of the corporation are hereby authorized and directed to obtain the execution by all of the stockholders of the corporation of a cer-

tificate of dissolution by unanimous consent, and to file said certificate with the Secretary of State of the State of Delaware.

The Chairman then announced that the corporation, acting through its officers, had transferred and delivered over to The B. F. Goodrich Company at the close of business on June 30, 1934, all of its assets in anticipation of the immediate dissolution of the company. Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved that the stockholders of this corporation do hereby unanimously ratify and approve the action of the management of the corporation in transferring and delivering over to The B. F. Goodrich Company at the close of business on June 30, 1934, possession and control of all of the property and assets of the corporation as a distribution in kind of all of the assets of the corporation to its stockholders, all of its issued and outstanding stock being owned and/or controlled by said The B. F. Goodrich Company, and

Be it further resolved that the President or a Vice President and the Secretary or an Assistant Secretary be and they hereby are authorized to execute in the name and on behalf of the corporation a good and sufficient deed of conveyance of all of the real estate of this corporation to The B. F. Goodrich Company, and to perform and execute all such further

acts and assignments of bills and accounts receivable or other instruments as may be necessary or convenient to vest in The B. F. Goodrich Company full and complete title to all of the assets of this corporation.

The Secretary then called to the attention of the meeting the fact that the company should be withdrawn from the State of California, so as to prevent the incurring of further liability for taxes in that state. Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved that the proper officers of the corporation are hereby authorized and directed to execute and file with the proper official or officials of the State of California a certificate of withdrawal or such other instruments as may be necessary to effectuate the withdrawal of this corporation from the State of California.

There being no further business, the meeting on vote adjourned.

SPECIAL MEETING OF THE BOARD OF DIRECTORS OF PACIFIC GOODRICH RUBBER COMPANY

Minutes of a special meeting of the Board of Directors of Pacific Goodrich Rubber Company, a Delaware corporation, held at 500 South Main Street, Akron, Ohio, Friday, August 24, 1934.

There were present Messrs. J. D. Tew, S. B. Robertson, T. B. Tomkinson, and S. M. Jett, representing a majority of the Board of Directors and therefore constituting a quorum for the transacting of business.

Mr. Tew, President, presided as Chairman of the meeting, and Mr. Jett, Secretary kept the minutes. The Chairman ordered the Secretary to file with the minutes of the meeting a waiver of notice and consent signed by all the directors of the corporation.

The Chairman then announced that the meeting had been called for the purpose of formally ratifying the execution and delivery of a certain assignment by the corporation, dated June 30, 1934, to The B. F. Goodrich Company and for the further purpose of authorizing the execution of deeds of conveyance and such other instruments as may be necessary to vest in The B. F. Goodrich Company full and complete title to all real property owned by the corporation.

Thereupon, on motion duly made and seconded, it was by unanimous vote

Resolved, that the Directors of this corporation do hereby unanimously ratify and approve the execution and delivery by the President and Secretary of the corporation of a certain assignment, dated June 30, 1934, transferring and setting over unto The B. F. Goodrich Company all rights, claims, and choses in action of every nature and description which the corporation now has or shall have against any and

all persons, firms or corporation, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment, and

Be it further resolved, that the President or a Vice President and the Secretary or an Assistant Secretary be and they hereby are authorized to execute in the name and on behalf of the corporation a good and sufficient deed of conveyance of all of the real estate of this corporation to The B. F. Goodrich Company, and to perform and execute all such further acts as may be necessary or convenient to vest in The B. F. Goodrich Company full and complete title to all of the real estate of this corporation.

There being no further business, the meeting on vote adjourned.

Mr. Blanche: We offer as Plaintiff's next exhibit, J, certificate of the Secretary of State of Delaware certifying the dissolution, under date of December 21, 1934, of Pacific Goodrich Rubber Company.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit J.")

PLAINTIFF'S EXHIBIT J

State of Delaware
Office of Secretary of State

CERTIFICATE OF DISSOLUTION

To All Whom These Presents May Come, Greeting:

Whereas, It appears to my satisfaction by duly authenticated record of the proceedings for the voluntary dissolution thereof, by the consent of all the stockholders deposited in my office, the Pacific Goodrich Rubber Company a corporation of this State whose principal office is situated at No. 100 West 10th Street in the city of Wilmington, County of New Castle State of Delaware The Corporation Trust Company being agent therein, and in charge thereof, upon whom process may be served, has complied with the requirements of the Corporation Laws of the State of Delaware, as contained in 1915, Section 1, to 2101 Section 187, Chapter 65, of the Revised Statutes of 1915, as amended, preliminary to the issuing of this Certificate of Dissolution.

Now, therefore, I Walter Dent Smith Secretary of State of the State of Delaware, do hereby certify that the said corporation did on the twenty-first day of December A. D. 1934 file in the office a duly executed and attested consent, in writing, to the dissolution of said corporation executed by all the stockholders thereof, which said consent and the records of the proceedings aforesaid, are now on file in my said office as provided by law.

In testimony whereof, I have hereunto set my hand and official seal, at Dover this twenty-first

day of December in the year of our Lord one thousand nine hundred and thirty-four.

(Seal)

WALTER DENT SMITH

Secretary of State

State of Delaware,

New Castle County—ss.

Recorded in the Recorder's Office at Wilmington, in Corporation Record W Vol. 42 Page 101 &c., the 23rd day of January A. D., 1935.

Witness my hand and official seal.

ALBERT STETSER

Recorder,

By EUGENE N. SCARBOROUGH

Deputy Recorder.

Mr. Blanche: If the Court please, that concludes the exhibits to be introduced by Plaintiff with the exception of Exhibit A, which is to be supplied [10] when the messenger arrives with the photostated copy.

The Court: With that, the Court understands that the Plaintiff rests now—

Mr. Blanche: Yes, your Honor.

Mr. Jewell: On behalf of the Government, I would like to offer into evidence a copy of the manufacturers' excise tax return for the month of November, filed by the Pacific Goodrich Rubber Company, Los Angeles, California.

The Clerk: Government's Exhibit 1.

(The document referred to was received in evidence and marked "Government's Exhibit No. 1.")

Form 700—Revised Sept., 1933
TREASURY DEPARTMENT
GENERAL REVENUE SERVICE

1527

GOVERNMENT'S EXHIBIT 1

MANUFACTURER'S EXCISE TAXES

CHARACTER OF TAX	RATE	AMOUNT OF TAX	AMOUNT OF TAX
General Tax	2% A	\$ 1.10	\$ 1.10
Excise Tax			
Transfer Tax			
Other Taxes			
Total			

PAYMENT INFORMATION:

No. and Street
City and State

PACIFIC GOODRICH RUBBER CO
5800 E 9TH ST
LOS ANGELES CALIF 10835

REMARKS:

This form must be returned to the Collector of Internal Revenue.

INSTRUCTIONS

(For full instructions see Regulations 44, June, 1922, and Regulations 47, revised Oct., 1929)

1. LA W.—The Revenue Act of 1932 imposes taxes upon the following articles sold by the manufacturer, producer, or importer:

- [illegible]

Mr. Jewell: I also offer into evidence on behalf of the Government, copy of the return of the manufacturers' excise taxes for the month of December 1933, filed by the Pacific Goodrich Rubber Company, Los Angeles, California.

The Clerk: Government's Exhibit 2.

(The document referred to was received in evidence and marked "Government's Exhibit No. 2.")

MANUFACTURER'S EXCISE TAXES

GOVERNMENT'S EXHIBIT 2

EXCISE TAXES FOR THE YEAR 1934

CHARACTER OF TAX	RATE	AMOUNT OF TAX
(1) Tax on rubber (exclusive of metal rims and rim bands)—on total weight	2%	1.10
(2) Tax on watches, clock parts, and watches	10%	1.10
(3) Tax on jewelry	10%	1.10
(4) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(5) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(6) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(7) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(8) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(9) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(10) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(11) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(12) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(13) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(14) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(15) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(16) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(17) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(18) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(19) Tax on gold chains and bodies and metal eyeglasses	10%	1.10
(20) Tax on gold chains and bodies and metal eyeglasses	10%	1.10

RECEIVED
PACIFIC GOODRICH RUBBER CO
LOS ANGELES, CALIF.
DEC 21 1933
I am for the purpose of the foregoing to return the amount of tax due for the month of DEC 1933 in the amount of the credit deducted in normal and allowable by law.

Name **PACIFIC GOODRICH RUBBER CO**
No. and Street **5400 E 9TH ST**
City and State **LOS ANGELES CALIF 10063**

Signed **PACIFIC GOODRICH RUBBER COMPANY**
Notary Public
JAN 21 1934

ORIGINAL RETURN.—This form must be returned to the Collector of Internal Revenue.

INSTRUCTIONS

(For full instructions see Regulations 46, June, 1933, and Regulations 47, revised Oct., 1933)

1. LAW.—The Revenue Act of 1930 imposes taxes upon the following articles sold by the manufacturer, producer, or importer:
 - (a) Tires wholly or in part of rubber (exclusive of metal rims and rim bands)—on total weight. 2% on total weight.
 - (b) Watches, clock parts, and watches. 10% of sale price.
 - (c) Jewelry. 10% of sale price.
 - (d) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (e) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (f) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (g) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (h) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (i) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (j) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (k) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (l) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (m) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (n) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (o) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (p) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (q) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (r) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (s) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (t) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (u) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (v) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (w) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (x) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (y) Gold chains and bodies and metal eyeglasses. 10% of sale price.
 - (z) Gold chains and bodies and metal eyeglasses. 10% of sale price.

B-4

Mr. Jewell: I also offer into evidence a copy of the claim for abatement for the period from June 21, 1932 through June 30, 1934, filed on July 8, 1936, by The B. F. Goodrich Company, successor to the Pacific Goodrich Company, at Akron, Ohio.

The Clerk: Government's Exhibit 3.

(The document referred to was received in evidence and marked "Government's Exhibit No. 3.") [11]

GOVERNMENT'S EXHIBIT 3

CLAIM

To be filed with the Collector where assessment
was made or tax paid

Received Jul. 8, 1936. Collector of Internal Revenue,
18th Dist. of Ohio, Claims Division.

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse side.

- ☐ Refund of tax illegally collected.
- ☐ Refund of amount paid for stamps unused, or
used in error or excess.
- ☒ Abatement of tax assessed (not applicable to
estate or income taxes).

State of Ohio,

County of Summit—ss.

Name of taxpayer or purchaser of stamps—The
B. F. Goodrich Company, successor to Pacific
Goodrich Rubber Company.

Business address—500 South Main Street, Akron, Ohio.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Los Angeles, California District.
2. Period (if for income tax, make separate form for each taxable year) from June 21, 1932 thru June 30, 1934.
3. Character of assessment or tax—excise tax.
4. Amount of assessment, \$33,876.26 plus interest in sum of \$7,701.48.
5. Date stamps were purchased from the Government—Excise tax incurred during various months for period above named.
6. Amount to be refunded—\$
7. Amount to be abated (not applicable to income or estate taxes)—full amt. of assessment, namely \$33,876.26 plus interest in sum of \$7,701.48.
8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 19..., on, 19....

The deponent verily believes that this claim should be allowed for the following reasons:

See Exhibit "A", consisting of four typewritten

pages, attached hereto and made a part of this claim.

(Signed) **THE B. F. GOODRICH COMPANY,**
Successor to The Pacific Goodrich
Rubber Company

By [Name illegible]

(Seal)

Treas.

Sworn to and subscribed before me this 7th day
of July, 1936.

ALBERTA M. TEWERS

Notary Public

My Commission expires December 15, 1938.

(See Instructions on Reverse Side)

Exhibit "A"

Reference is made to the report of Internal Revenue Agents, A. M. Menninger, George L. Carr, and Fred L. MacCarroll, dated March 4, 1936, in which it is recommended that an assessment of additional excise tax in the sum of \$33,876.26, plus appropriate interest, be made against the Pacific Goodrich Rubber Company.

Pacific Goodrich Rubber Company transferred its assets to The B. F. Goodrich Company on or about June 30, 1934, and was dissolved December 21, 1934. Hence, the proper taxpayer is The B. F. Goodrich Company.

The taxpayer insists that the recommendation of the Revenue Agents is erroneous and hereby protests any assessment of additional excise taxes for

the period involved, based upon said recommendation, for reasons hereinafter set forth.

Schedule #1. "Borrowed Tires"—\$11,057.97

The Revenue Agents' report proposes an assessment under the above schedule against tires which Pacific Goodrich Rubber Company delivered to The B. F. Goodrich Rubber Company after June 21, 1932, for which no tax was paid in the Pacific Goodrich Rubber Company returns. The tires in question were tires delivered in repayment of the loan of inventory from time to time made by The B. F. Goodrich Rubber Company to the Pacific Goodrich Rubber Company in order to permit the latter company to meet delivery requirements of its automobile manufacturers, export and government customers. Such deliveries were made on the same basis as the types and sizes originally borrowed.

There was in existence prior to the effective date of the excise tax levied by Section 602 of the Revenue Act of 1932, a contract between The B. F. Goodrich Rubber Company and Pacific Goodrich Rubber Company under which the latter company took the entire production of Pacific Goodrich Rubber Company as manufactured, said contract reserving the right in Pacific Goodrich Rubber Company to supply certain customers, among which were the class of customers above set out, the reason for reserving this right being due to competitive conditions which necessitated the sale of tires by a manufacturer direct to these customers. For the period from November, 1932 through June 1933,

the manufacturer's stock of tires was so out of balance that it was necessary for it to secure tires from The B. F. Goodrich Rubber Company for delivery to its customers. The inventory in the hands of The B. F. Goodrich Rubber Company which had been delivered by Pacific Goodrich Rubber Company subsequent to the effective date of Section 602 of the Revenue Act of 1932 was tax paid tires. If the Pacific Goodrich Rubber Company had paid a tax on tires which it delivered to The B. F. Goodrich Rubber Company in repayment of loans, such tires would have been subjected to a double tax.

The B. F. Goodrich Company, the parent company of both Pacific Goodrich Rubber Company and The B. F. Goodrich Rubber Company, had a contract with The B. F. Goodrich Rubber Company similar to that between Pacific Goodrich Rubber Company and The B. F. Goodrich Rubber Company. It also found itself in a similar condition to that of Pacific Goodrich Rubber Company with reference to its inability to make deliveries to its customers because of an unbalanced stock of merchandise, early in the tax period involved in this case. The B. F. Goodrich Company presented its problem to the Deputy Commissioner of Internal Revenue and received a ruling from that officer, that it could borrow tires under the circumstances above outlined, from its selling organization and return the same without incurring an excise tax at the time such tires were returned. After such ruling

had been secured from the Deputy Commissioner's office, Revenue Agents Dodson and MacCarroll made an examination of the books and records of The B. F. Goodrich Company for the purpose of determining its tax liability for the period from June 21, 1932 to December 31, 1932. The report of the above named Revenue Agents recommended an assessment of additional tax upon tires delivered to The B. F. Goodrich Rubber Company under the above outlined circumstances. This proposal was again considered by the Deputy Commissioner of Internal Revenue and the recommendation of Revenue Agents Dodson and MacCarroll was not approved and no additional tax was assessed, the Deputy Commissioner holding that such transaction was not a taxable transaction. Subsequent to this ruling, and on or about May 20, 1933, the Secretary of the Treasury executed with The B. F. Goodrich Company an agreement on Treasury Department Form 866. As soon as The B. F. Goodrich Company received the Commissioner's first ruling that the delivery of tires to The B. F. Goodrich Rubber Company by the manufacturer, under the circumstances above outlined, did not constitute a taxable transaction, it advised its subsidiary, the Pacific Goodrich Rubber Company, of such ruling.

Consequently, the transaction upon which the Revenue Agents are proposing an assessment of additional tax under Schedule #1 is a transaction which the Deputy Commissioner's office has heretofore held to be a non-taxable transaction.

The Pacific Goodrich Rubber Company did not "attempt in any manner to evade or defeat any tax or the payment thereof under Articles IV, V, VI, VII, VIII and/or IX." On the other hand, the taxpayer, through its parent company, advised the Deputy Commissioner of Internal Revenue just how these transactions were being treated and secured that officer's approval of so handling such transaction.

The position of the Internal Revenue Agents that the transaction above described was an attempt to rescind a completed sale is erroneous. There was never any cancellation of charges for tires sold by the Pacific Goodrich Rubber Company to The B. F. Goodrich Rubber Company and no merchandise was returned, so far as the transactions above described are concerned, both of which would be necessary in order to rescind a sale.

The taxpayer insists that the transactions above described are not taxable under the law and the interpretation of said law relied upon by the taxpayer, and that no part of the tax proposed in Schedule ± 1 should be assessed.

Schedule ± 2 . "Sales to Chevrolet Motor Company"

\$1,060.29

Statements made in connection with proposed tax under Schedule ± 1 apply generally to the tax proposed under Schedule ± 2 and the taxpayer's position with reference to the tax suggested under this schedule is the same as under Schedule ± 1 .

The only appreciable difference in the facts governing the transaction involved in this schedule is that some of the tires borrowed by Pacific Goodrich Rubber Company were of the manufacture of The B. F. Goodrich Company.

Schedule #3. "Credits taken for Borrowed Tires"
—\$3,443.30.

The facts in connection with the transaction involved under this schedule are the same as under Schedule #1 except that Pacific Goodrich Rubber Company did not repay The B. F. Goodrich Rubber Company for tires borrowed from it by type and size, due to the fact that both The B. F. Goodrich Rubber Company and Pacific Goodrich Rubber Company transferred their assets and were dissolved during 1934, and the only way by which Pacific Goodrich Rubber Company could liquidate its obligation to The B. F. Goodrich Rubber Company was through the delivery of tires of the same value as those previously borrowed, without regard to size and type.

The taxpayer insists that the handling of an isolated transaction in this manner could in no event affect the principle. Neither does it justify the assessment of the tax recommended by the Agents under this schedule.

Schedule #4. "Credit taken on sales made by The B. F. Goodrich Rubber Company to International Goodrich Rubber Company for export"
—\$11,305.72.

Pacific Goodrich Rubber Company complied with the provisions of Treasury Department Decision 4355 in connection with credits taken by it on merchandise sold into export through its subsidiary selling company. The documents supporting the handling of transactions in accordance with Treasury Decision 4355 are on file in the offices of The B. F. Goodrich Company at Akron, Ohio. The Revenue Agents making the examination were advised of this fact prior to the time the examination was made and during the examination. Documents supporting the credits taken under this schedule are, of course, quite numerous and the sending of these documents from Akron to Los Angeles would involve a considerable amount of trouble and expense as well as endanger the safety of such records. For this reason, the records were not sent to Los Angeles. The B. F. Goodrich Company hereby tenders these records to the Deputy Commissioner or any of his agents in its office in Akron, Ohio, or if the Commissioner insists, copies of such documents will be filed with the Deputy Commissioner's office.

The Revenue Agents' statement that credits involved under this schedule were not taken in accordance with these regulations is incorrect.

Schedule #5. "Credits taken on Tire Adjusted"—
\$6,908.98

The Pacific Goodrich Rubber Company took credits on tires adjusted under its guaranty on the

same basis as did The B. F. Goodrich Company, namely, credit was taken for all adjustments made under the manufacturer's guaranty, either expressed or implied, through the various agents and dealers of the manufacturer. In some cases, the defective tires were returned to the manufacturer; in others, they were not. In all instances, where a new tire was given to a customer through a dealer or agent of Pacific Goodrich Rubber Company, the tire which the agent or dealer gave to the customer was one which was furnished to it by the Pacific Goodrich Rubber Company, whether such tire was furnished for that specific purpose and directly following the adjustment or at some future time when shipment or delivery of that tire could be more conveniently and less expensively made to the dealer, and the cost of all adjustments was borne by Pacific Goodrich Rubber Company, the manufacturer liable to the customer for a defective tire.

The Revenue Agents' suggestion that The B. F. Goodrich Rubber Company, Goodrich Silvertown Stores, Inc. (Goodrich Silvertown Inc.), Pacific Goodrich Rubber Company, and other subsidiaries of The B. F. Goodrich Company should all be considered as one unit for tax purposes in order to allow this credit cannot be insisted upon by the taxpayer for such are not the facts. All of these corporations were separate entities doing business with each other at arm's length, upon a definite contract basis. A further fallacy in this suggestion is that in order to accomplish the purpose suggested

by the Revenue Agents, dealers would likewise have to be considered as a part of the Goodrich unit since a number of adjustments were made by dealers and since Pacific Goodrich Rubber Company's relations, so far as its sales and adjustments were concerned, were the same with the companies above named as with any other dealers.

"Brunswick Tires"

Payment of excise tax due on the sale of 835 Brunswick tires to the Cleveland office instead of the Los Angeles office, was the result of an error and if it is necessary to make any correction with reference to the District to which this tax was paid, it is suggested that an easier way to make this correction would be through an adjustment by the Government, particularly since the corporation who would have to pay any additional tax to Los Angeles is the same corporation who would file a claim for refund for the erroneous payment in Cleveland.

The facts set forth herein are supported by books, records and documents at the office of The B. F. Goodrich Company, Akron, Ohio.

The principle involved in connection with the tax recommended for assessment under Schedules 1, 2 and 5 have already been passed upon by the Deputy Commissioner and approved both through his act of declining to assess additional tax on recommendations made by the Internal Revenue Agents and by the closing agreement on Form 866. While the transaction upon which the Revenue Agents base

their recommendations for the assessment of the tax under Schedule #3 is not exactly the same as those involved as to Schedule #1, the taxpayer insists the principle is the same and that the principle has been passed upon by the Deputy Commissioner favorably to the taxpayer.

The Revenue Agents' recommendation with reference to an assessment of tax proposed under Schedule #4 is apparently based upon the lack of evidence required by Treasury Decision 4355 in connection with export credits. This information is available and can be checked in any manner in which the Government cares to have it checked.

In view of the foregoing, the taxpayer respectfully requests that the recommendation set forth in the Revenue Agents' report above referred to be disregarded and that no additional tax be assessed against The B. F. Goodrich Company as successor to Pacific Goodrich Rubber Company on the basis outlined in said report.

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Character of assessment and period involved	Lot	Year	Month	Page	Line	Amount assessed	Date	Amount	PAID
June 1932	Misc. 1932	July	528	3	22690	83	7/30/32	22690	83
July 1932	Misc. 1932	Aug.	534	2	180571	77	8/2/32	180571	77
Aug. 1932	Misc. 1932	Oct.	540	5	176681	04	10/5/32	176681	04
Sept. 1932	Misc. 1932	Nov.	1009	4	192047	88	11/2/32	192047	88
Oct. 1932	Misc. 1932	Dec.	1007	1	127539	82	12/1/32	127539	82
Nov. 1932	Misc. 1932	Dec.	1055	6	104745	49	12/31/32	104745	49
Dec. 1932	Misc. 1933	Feb.	1005	2	130157	11	2/1/33	130157	11
Dec. 1932	Misc. 1932	Dec.	1058	6	156	65	12/31/32	156	65
Adm'l Tax-1932	Misc. 1932	Dec.	203	0					
Jan. 1933	Misc. 1933	Mar.	1013	8	162371	17	3/2/33	162371	17
Feb. 1933	Misc. 1933	Apr.	1009	6	182294	71	4/3/33	182294	71
Total						8			

say that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold on Account	Kind	Number	Denomination	Date of sale or issue	Amount	If special tax stamp, state serial number	Period commencing
See Ch. No. 6-6775							
R-37425							
R-22598							
				ENTERED			

ABATEMENT

6170

SEP 30 1937

P. R. Stone

Collector of Internal Revenue

18th Dist.

(District)

COMMITTEE ON CLAIMS

Claim examined by:

[Signature]

Claim approved by:

[Signature]

Chief of Division

Amount claimed...

Amount allowed... \$

Amount rejected... \$41,577.74

INSTRUCTIONS

- The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
- The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, an affidavit of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer, and accompanying the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
- If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the latest testamentary, letters of administration, or other similar evidence must be attached to the claim, to show the authority of the executor, administrator, or other legal representative to file the claim. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and a refund claim, the claim must be accompanied by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary and the return. If a corporation is the taxpayer, the claim must be signed with the corporate name, countersigned by the signature and title of the officer having authority to sign for the corporation.

Mar. 1933	Mar. 1933	Mar. 1933	1005	6	144,420	70	5/2/33	144,420	70	PA.
Apr. 1933	Mar. 1933	June 1933	1006	4	303,166	12	6/2/33	303,166	12	PA.
May 1933	Mar. 1933	July 1933	1007	2	440,183	32	7/6/33	440,183	32	PA.
June 1933	Mar. 1933	Aug. 1933	1008	3	539,629	15	8/2/33	539,629	15	PA.
July 1933	Mar. 1933	Sept. 1933	1009	1	428,608	75	9/2/33	428,608	75	PA.
Aug. 1933	Mar. 1933	Oct. 1933	1010	1	368,728	60	10/2/33	368,728	60	PA.
Sept. 1933	Mar. 1933	Nov. 1933	1011	2	243,822	39	11/2/33	243,822	39	PA.
Oct. 1933	Mar. 1933	Dec. 1933	1012	8	185,098	28	12/2/33	185,098	28	PA.
Nov. 1933	Mar. 1933	Jan. 1934	1013	5	152,368	63	1/2/34	152,368	63	PA.
Dec. 1933	Mar. 1933	Feb. 1934	1014	2	218,398	45	2/2/34	218,398	45	PA.
Jan. 1934	Mar. 1933	Mar. 1934	1015	5	221,928	32	3/2/34	221,928	32	PA.
Feb. 1934	Mar. 1933	Apr. 1934	1016	9	274,973	39	4/2/34	274,973	39	PA.
Mar. 1934	Mar. 1933	May 1934	1017	2	343,995	63	5/2/34	343,995	63	PA.
Apr. 1934	Mar. 1933	June 1934	1018	6	382,037	65	6/2/34	382,037	65	PA.
May 1934	Mar. 1933	July 1934	1019	4	429,790	32	7/2/34	429,790	32	PA.
June 1934	Mar. 1933	Aug. 1934	1020	6	186,139	33	8/2/34	186,139	33	PA.

1001 246
 Mar 2 1933
 Special Account
 6/2/32 to 12/2/32 - Mar. 1933 - Apr. 1933 6 59 33 4/12/33 59 33 PA.
 June to Dec. 1932

1934
 DATE: 5/2/34
 1934
 DATE: 5/2/34
 1934
 DATE: 5/2/34
 1934
 DATE: 5/2/34

E-3

14766

Mr. Jewell: We offer into evidence a copy of claim for abatement, filed on May 19, 1936 by Nat Rogan, for the Pacific Goodrich Rubber Company, Los Angeles, California. .

The Clerk: Government's Exhibit 4.

(The document referred to was received in evidence and marked "Government's Exhibit No. 4.")

GOVERNMENT'S EXHIBIT 4
CLAIM

To be filed with the Collector where assessment
was made or tax paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse side.

- ☐ Refund of tax illegally collected.
- ☐ Refund of amount paid for stamps unused, or
used in error or excess.
- ☒ Abatement of tax assessed (not applicable to
estate or income taxes).

State of Calif.,

County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps—Collector for Pacific Goodrich Rubber Co.

Business address—Los Angeles, Calif.

Residence

The deponent, being duly sworn according to law,
deposes and says that this statement is made on be-

half of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed.....
2. Period (if for income tax, make separate form for each taxable year) from, 19...., to....., 19....
3. Character of assessment or tax.....
4. Amount of assessment, \$.....; dates of payment
5. Date stamps were purchased from the Government
6. Amount to be refunded—\$.....
7. Amount to be abated (not applicable to income or estate taxes)—\$41,577.74.
8. The time within which this claim may be legally filed expires, under Section of the Revenue Act of 19...., on, 19....

The deponent verily believes that this claim should be allowed for the following reasons:

Abatement is asked of assessment on my March 1936 Misc. list, 2018/8, in accordance with Bureau instructions. See copy of telegram attached.

(Signed) NAT ROGAN
Collector

Sworn to and subscribed before me this 27 day of May, 1936.

DOROTHY F. HARRIS
Dep. Coll.

[Telegram]

Postal Telegraph

Collector Internal Revenue

LosA

May 18, 1936.

Re assessment page twenty eighteen line eight
your March nineteen thirty six miscellaneous assess-
ment list against Pacific Goodrich Rubber Co Los
Angeles Suggest you file Collectors abatement claim
since assessment should have been against B F
Goodrich Company Akron Ohio and amount rec-
ommended also appears excessive

BLISS

Deputy

NO PREVIOUS CLAIM

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax:

Particulars	Year	Month	Amount	Amount allowed	Amount rejected
Excise tax	Misc 1936	Mar. 2018	8	33,876.26	
Interest				7,701.48	

DATE SUBMITTED BY
COMMISSIONER

Total \$ 41,577.74

I certify that the records of this office show the following facts as to the purchase of stamps:

Stamp sold on	Kind	Number	Description	Date of sale or issue	Amount	Period
ABATEMENT						

Collector of Internal Revenue

COMMITTEE ON CLAIMS

DEPUTY COMMISSIONER

Amount claimed... \$41,577.74

Amount allowed... \$41,577.74

Amount rejected... \$

INSTRUCTIONS

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.
2. The claim should be signed by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer must accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.
3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the last testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.
4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

8-31706

C-2

Mr. Jewell: With the Court's permission, I would like to confer with counsel.

The Court: Very well.

(Conference between counsel.)

Mr. Jewell: Reference is made to Paragraph (6)a of the stipulation on file herein. I believe it will be stipulated that that paragraph will be corrected to eliminate the statement there that the principal of the tax was assessed, and will be made to read so that the principal and interest were demanded, not assessed, of the Pacific Goodrich Company on the date—I believe April 10, 1934—and that the principal of that additional tax was never assessed but that the interest was assessed on June 9, 1934.

Mr. Leslie: Mr. Jewell, would you modify your stipulation by saying, "not formally assessed"—Otherwise I have no objection.

Mr. Jewell: That it was not formally assessed.

The Court: That is the principal—

Mr. Jewell: That is the principal; thereby meaning that the amount was not shown as due on the assessment roll when the assessment roll was signed by the Commissioner of Internal Revenue.

The Defendant rests.

Mr. Blanche: If the Court please, I believe that we may have a stipulation from counsel for the Government to the effect that the materiality and the relevancy of the exhibits introduced by the Gov-

ernment, not as to the competency, may be raised at any time.

Mr. Jewell: So stipulated.

Mr. Blanche: Prior to the submission and filing of the brief.

The Court: So understood.

Mr. Blanche: With the consent of the counsel for the Government, I would like to make a few typographical corrections in the amended petition. The various amounts were discovered only after the first amended petition was filed.

On page 6, paragraph 7, line 25, the date should be "April 18" in lieu of "April 17."

The next correction appears on line 1, of page 7, of paragraph XIV, and it is the same correction as noted before, namely, that "April 17" is corrected to read "April 18."

The Court: Gentlemen, the date as shown on the photostatic copy of the claim and is annexed to the first amended petition on page 8 thereof, are those dates to remain the same—Under statement "H", arabic eight—

Mr. Leslie: That is on the claim, your Honor—I am sorry; I don't follow you.

(The document referred to was passed to counsel.)

Mr. Leslie: This date should be "April 18," is that the point—

The Court: Yes.

Mr. Leslie: That is correct, your Honor. That should be changed to "April 18."

The Court: Then the record shows that the change should be made on the claim which appears annexed to page 8 of the first amended petition to "April 18" instead of "April 17"—I suppose that will be true wherever the date "April 17" appears.

Mr. Leslie: I was about to suggest, your Honor, that we stipulate that where the date "April 17" appears it should be "April 18."

The Court: Is that stipulated, Mr. Jewell—

Mr. Jewell: So stipulated.

The Court: Are there any dates to be supplied in paragraph IX, page 9, beginning at line 5: "That plaintiff on or about April * * *"—

Mr. Blanche: (Interrupting): Yes, your Honor. That is April 10. That appears throughout the petition. We suggest a stipulation to the effect that "April 10" in each case be deemed to be the date.

Mr. Jewell: So stipulated. [14]

Mr. Blanche: The next correction would be page 12, paragraph XI, line 14, the figures "784,177" should be "782,474," for the reason that while a tax was paid on 784,177, the records of the company did not demonstrate that there was more than 782,474 pounds of the tire fabric thread and other materials on hand and which were consumed in the making of tires between August 1, 1933 and January 5, 1934.

The Court: That corrected figure then is 782,474—

Mr. Leslie: Correct.

Mr. Blanche: Yes, your Honor.

The Court: Of course, the Government does not object to that. It is a lesser amount.

Mr. Jewell: I will so stipulate. I have examined the records, your Honor.

Mr. Blanche: The next correction appears on page 13, line 7; the figures "757,260" should be "705,806."

The next correction is on line 8, page 13, paragraph XII, the figure "784,177" should be "782,474."

The next correction appearing on the same page but in paragraph XIII, the figure "757,260" should be changed to "705,806."

The Court: Shouldn't that correction on line 8 of paragraph XII, read "782,477" or "474"—

Mr. Blanche: 474.

The next correction occurs on page 14, paragraph XII, line 6; the figure "757,260" again becoming "705,806."

The Court: Paragraph XIII—[15]

Mr. Blanche: Paragraph XIII, on page 14; yes, your Honor.

I believe your Honor has noted that on line 13, paragraph XIV, of page 14, "April 17" becomes "April 18."

The Court: Yes.

Mr. Blanche: With those typographical amendments, the Plaintiff rests.

Mr. Jewell: I would like the Court's permission to confer with counsel for the Plaintiff.

The Court: Very well.

(Conference between counsel.)

Mr. Blanche: Counsel for the Government, if the Court please, and counsel for the Plaintiff have suggested, subject to the Court's wishes, that counsel for the Plaintiff may have 20 days within which to file an opening brief.

I might suggest that the 20 days might start to run from Monday next, for the reason that the brief will be largely prepared in Akron, and the time of transmittal occasioned thereby will give us a little longer time.

The Court: So ordered. Twenty days from Monday—that is Lincoln's birthday—20 days from February 13th.

Mr. Blanche: Very well, your Honor.

And also it has been suggested that the Government have likewise 20 days and Plaintiff have a further 10 days.

We offer that stipulation.

The Court: So ordered. [16]

Upon the filing of the last brief, pursuant to rule, the cause will stand submitted for decision.

The record should show that the Court has indicated on the original files the first amended petition certain pencil notations in accordance with the suggested corrections, and if it is satisfactory the corrections may be made by the Clerk on the original file.

Mr. Blanche: So stipulated, your Honor.

Mr. Jewell: So stipulated.

The Court: Is that all, Mr. Hansen—

The Clerk: Yes, your Honor.

(Whereupon, at 10:40 o'clock a.m., February 10, 1940, the above-entitled matter stood submitted.)

State of California,

County of Los Angeles—ss.

I, A. Wahlberg, an official reporter of the District Court of the United States in and for the Southern District of California, Central Division, do hereby certify that the foregoing pages 1 to 17, both inclusive, comprise a duplicate copy of the original full, true and correct transcript of the testimony taken and proceedings had on the 10th day of February, 1940, in the hearing of the case of the B. F. Goodrich Company, a corporation, plaintiff, v. United States of America, defendant, No. 8138-M Civil, and that said transcript contained on said pages comprises all of the statements of counsel and of the court and ruling of the court made during the progress of said hearing on said day; and that the original of said transcript was delivered on February 20, 1940, to the Honorable Paul J. McCormick, the Judge before whom the aforementioned hearing was had.

Dated: this 29th day of January, 1942.

A. WAHLBERG

Official Reporter

[Endorsed]: Filed Jan. 29, 1942.

[Title of District Court and Cause.]

DEFENDANT'S REPLY BRIEF

III.

"Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). The Government objects to the materiality of these statements on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff's predecessor."

[Endorsed]: No. 10035. United States Circuit Court of Appeals for the Ninth Circuit. The B. F. Goodrich Company, a corporation, Appellant, vs. United States of America, Appellee: Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 30, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals for the Ninth
Circuit

No. 10035

THE B. F. GOODRICH COMPANY, a corpora-
tion,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF THE
PARTS OF THE RECORD TO BE
PRINTED.

Comes now The B. F. Goodrich Company, a corporation, the appellant in the above entitled cause, and states that the points upon which it intends to rely in this court in this case are the following:

I.

The court erred in denying plaintiff's motion to reopen case to admit further proof (record on appeal, p. 83).

II.

The court erred in that it abused its discretion in denying plaintiff's motion to reopen case to admit further proof (record on appeal, p. 83).

III.

The court erred in sustaining defendant's objection to the following stipulated testimony of the witness George Hubbell, as set forth on pages 4, 5, 9 and 10 of the stipulation of facts (record on appeal, pp. 59, 60, 64, 65):

"That the books and records of said Pacific Goodrich Rubber Company * * * were and are kept under the supervision and control of the said George Hubbell, his duties being, among others, to keep said books and records; that he, the said George Hubbell is familiar with and knows the prices at which tires were sold by Pacific Goodrich Rubber Company at all the times mentioned in said First Amended Petition herein and is familiar with and knows whether or not there was included in the price of the tires sold by Pacific Goodrich Rubber Company during the period from August 1, 1933 to the 5th day of January, 1934, any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold by Pacific Goodrich Rubber Company during said period, and is familiar and knows whether the prices at which Pacific Goodrich Rubber Company sold tires during said period containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act were any greater than the prices at which during said period Pacific Goodrich Rubber Company sold

tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, * * *

* * *

“* * * and that Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of tires sold during the period from August 1, 1933 to the 5th day of January, 1934, any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold during said period; and that the prices at which Pacific Goodrich Rubber Company sold said tires during said period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act, * * *”

Defendant's objection, made on page 14 of defendant's reply brief, the original of which is included in the record on appeal, reads as follows:

“Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). The Government objects to the materiality of these statements on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff's predecessor.”

The court's ruling, appearing on pages 11 and 12 of the conclusions of the court on the merits of the action (record on appeal, pp. 78, 79), reads as follows:

"The burden of proving its right to refund rests throughout the action upon the plaintiff corporation and this burden is not sustained unless satisfactory evidence preponderates in plaintiff's favor, particularly that there has been no inclusion or collection by Pacific Goodrich Rubber Company of the tax in the price of the tires which have been sold by Pacific Goodrich Rubber Company. Substantially the only evidence produced upon this vital point is in the form of a stipulation entered into by Government counsel with the reservation as to its sufficiency, that the cashier and auditor of the taxpayer corporation would if called as a witness testify that he supervised, controlled and kept the books and records of the Pacific Goodrich Rubber Company at all times pertinent to this action and that he is familiar with and knows the prices at which tires were sold by the taxpayer at all applicable times; that he knows that during the period from August 1, 1933, to January 5, 1934, the taxpayer did not include or intend to include in the price of tires sold during such period any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold during such

period; that the prices at which the taxpayer sold tires during such period were no greater on tires containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act than the prices at which during such period it sold tires containing processed cotton on which a tax was payable under Section 9 of the Triple A. No books of account or sales records were produced and no explanation for their nonproduction was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue. We are not satisfied that the required burden of the nonpassage of the tax to vendees of the taxpayer has been sustained."

In the trial of this action counsel for plaintiff and defendant stipulated as follows (reporter's transcript, pp. 5-7, a certified copy of which is included in the record on appeal):

"Mr. Blanche: If it please the Court, at this time I propose to offer a stipulation of facts in this matter which has been signed by counsel for the Government and counsel for the petitioner, the plaintiff.

"By stipulation of counsel for the Government, there will be no question of a foundation raised. However, there may be raised, either at this time, or at the time of the filing of the brief, a question regarding, or questions regarding, the materiality of the facts stipulated to.

the relevancy of the facts stipulated to and of the sufficiency of the proof made.

"We appreciate that the latter may always be raised, but in order that there be no misunderstanding we make that statement.

"The latter sufficiency of the proof made particularly pertains to the question of whether the tax was passed on to the consumer or whether the tax was subsequently billed by the consumer after the tax was assessed and levied.

"It is our contention, of course, that inasmuch as the tax was not levied until some four months after the return, we were not apprised of it, we did not include it in the price of the commodity, and there is a statement to the effect that it was not covered with subsequent billing.

"This stipulation, if the Court please, takes two forms. The first form is a stipulation as to ultimate facts, these having to do with items that are not denied in the first amended petition. The second takes the form that if two particular witnesses were called they would testify as set forth in the stipulation.

"Is that a correct statement, Mr. Jewell—

"Mr. Jewell: That is a correct statement.

"The Court: I suppose that the stipulation that they would so testify is also made subject to the materiality and relevancy of that evidence.

"Mr. Blanche: Yes, your Honor."

IV.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action was at any time acquired by plaintiff from the Pacific Goodrich Rubber Company.

V.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action was assigned, transferred and delivered by the Pacific Goodrich Rubber Company to the plaintiff, on or about June 30, 1934, in anticipation of the immediate dissolution of the Pacific Goodrich Rubber Company and as a distribution in kind of all of the assets of that company to plaintiff as its sole stockholder.

VI.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action, if not acquired by plaintiff as provided in paragraph V, supra, or in paragraph VII, infra, passed to plaintiff as the sole stockholder of the Pacific Goodrich

Rubber Company upon the dissolution of that company on or about December 21, 1934.

VII.

The court erred in that it wholly failed and refused to make a finding upon the material issue of fact as to whether or not the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action, if not acquired by plaintiff as provided in paragraph V or VI, *supra*, was assigned, transferred and delivered by the Pacific Goodrich Rubber Company to the plaintiff on or about August 14, 1935, as a distribution in kind of all the assets of the Pacific Goodrich Rubber Company to plaintiff as its sole stockholder pursuant to the dissolution of said company on or about December 21, 1934.

VIII.

The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a total absence of any evidence, competent or otherwise, to support a contrary finding.

That at the close of business on June 30, 1934, the officers of the predecessor in interest of the plaintiff, the Pacific Goodrich Rubber Company, in anticipation of immediate dissolution of that company, transferred and delivered over to the plaintiff possession and control of all of the property and assets

of the Pacific Goodrich Rubber Company, including the right to the refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action, as a distribution in kind of all of the assets of that company to the plaintiff as its sole stockholder. That as evidence of said distribution in kind the Pacific Goodrich Rubber Company on said 30th day of June, 1934, executed a written assignment by the terms of which it assigned, transferred and set over to the plaintiff all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or would have against any and all persons, firms or corporations. That a true copy of said written assignment is set forth at lines 1-28, inclusive, page 3, of the first amended petition of the plaintiff herein. That the aforesaid action of the officers of the Pacific Goodrich Rubber Company in making said distribution in kind of all of the assets of that company to the plaintiff, in anticipation of the immediate dissolution of said company, was ratified and approved, and the dissolution of said company authorized by the Board of Directors and by the stockholders of said company on July 6, 1934. That thereafter, to wit, on August 24, 1934, the execution and delivery to the plaintiff of the aforementioned written assignment of June 30, 1934, was ratified and approved by the Board of Directors of the Pacific Goodrich Rubber Company. That following the dissolution of said Pacific Goodrich Rubber

Company on or about December 21, 1934, said company, on August 14, 1935, executed a further written assignment as a supplement to the aforementioned assignment of June 30, 1934, by the terms of which supplemental assignment said company assigned and transferred to the plaintiff all claims, demands, choses in action or causes of action of whatsoever kind or nature which it had or might later have against all persons whomsoever including in particular its claim for refund of the manufacturer's excise tax and the interest thereon sought to be recovered in this action. That a true copy of said written assignment of August 14, 1935, is set forth at line 7, page 4, to line 11, page 5, inclusive, of the first amended petition of the plaintiff herein.

IX.

The court erred in that it failed and refused to make a finding upon the material issue of fact as to whether or not the Pacific Goodreih Rubber Company included or intended to include in the price of the tires sold by it during the period from August 1, 1933, through January 5, 1934, any amount to cover any excise tax on the processed cotton contained therein.

X.

The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a

total absence of any evidence, competent or otherwise, to support a contrary finding:

That Pacific Goodrich Rubber Company did not include nor did it intend to include in the price of the tires sold by it during the period from August 1, 1933, through January 5, 1934, any amount to cover any excise tax on the processed cotton contained therein.

XI.

The court erred in that it failed and refused to make a finding upon the material issue of fact as to whether or not during the period from August 1, 1933, to April 10, 1934, the prices at which the Pacific Goodrich Rubber Company sold tires containing processed cotton on which a tax was paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was paid under Section 9(a) of said Act.

XII.

The court erred in failing and refusing to find the following facts for the reason that such facts are ultimate facts supported by competent evidence and there is no finding of fact to the contrary and a total absence of any evidence, competent or otherwise, to support a contrary finding:

That during the period from August 1, 1933, to April 10, 1934, the prices at which the Pacific Goodrich Rubber Company sold tires contain

ing processed cotton on which a tax was paid under Section 16 of the Agricultural Adjustment Act were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was paid under Section 9(a) of said Act.

XIII.

The court erred in making and entering its following quoted conclusion of law No. V (record on appeal, p. 120), for the reason that said conclusion of law is contrary to law, is not supported by the facts found and to the extent that it may be deemed to be a finding of fact, it is not supported by the evidence in that all of the evidence, which was both competent and sufficient, was to the contrary, and for the further reason that said conclusion of law is irreconcilably inconsistent to the extent that the court concludes that the right to the refund of the tax which is sought to be recovered in this action was vested in the plaintiff by reason of the two written assignments of June 30, 1934, and August 14, 1935, and at the same time concludes that said assignments to the extent that they constituted assignments of a claim against the United States were absolutely null and void ab initio under the provisions of Sec. 3477 of the Revised Statutes:

"That the right to the refund of the tax which is sought to be recovered in this action was not acquired by the plaintiff by reason of its ownership of all of the stock of the Pacific

Goodrich Rubber Company or by the dissolution of that company or by the distribution in kind by said company of all of its assets to plaintiff, but vested in plaintiff by reason of the two written assignments executed by the Pacific Goodrich Rubber Company in favor of the plaintiff on June 30, 1934, and August 14, 1935, respectively. That said assignments to the extent that they constituted assignments of a claim against the United States were absolutely null and void ab initio under the provisions of Sec. 3477 of the Revised Statutes and the plaintiff accordingly acquired no rights thereunder to the refund of the tax herein sought to be recovered. That the plaintiff also acquired no right to the refund of the tax herein sought to be recovered by reason of its ownership of all of the stock of the Pacific Goodrich Rubber Company or by dissolution of that company or by the distribution in kind by said company of all of its assets to the plaintiff."

XIV.

The court erred in making and entering its following quoted conclusion of law No. VI (record on appeal, p. 121), for the reason that said conclusion of law is contrary to law, is not supported by the facts found and to the extent that it may be deemed to be a finding of fact, it is not supported by the evidence in that all of the evidence, which was both competent and sufficient, was to the contrary:

“That under Sec. 621 (d) of the Revenue Act of 1932 only ‘the person who paid the tax’ can establish the facts required by that section to be established as a condition to the allowance of a refund of such taxes under Sec. 3220 of the Revised Statutes. That the plaintiff is not ‘the person who paid the tax’ within the meaning of that phrase as used in Sec. 621 (d) of the Revenue Act of 1932.”

XV.

The court erred in making and entering its following quoted conclusion of law No. VII (record on appeal, p. 121), for the reason that said conclusion of law is contrary to law, is not supported by the facts found and to the extent that it may be deemed to be a finding of fact, it is not supported by the evidence in that all of the evidence, which was both competent and sufficient, was to the contrary:

“That plaintiff failed to establish that the tax, the refund of which is sought by this action, was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Sec. 621 (d) of the Revenue Act of 1932.”

XVI.

That the court erred in rendering judgment for the defendant, the respondent herein (record on appeal, p. 122).

XVII.

That the judgment is contrary to law.

Appellant further states that the whole of the record on appeal, as certified by the clerk of the District Court and filed herein, including the reporter's transcript, original papers and exhibits, is deemed necessary to be printed for the consideration of the points set forth above.

Dated, this 30 day of January, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Counsel for appellant, The
B. F. Goodrich Company

[Endorsed]: Filed Jan. 31, 1942. Paul P.
O'Brien, Clerk.

Received copy of the within Statement of Points
to be relied upon and designation of the parts of the
record to be printed, this 30 day of January, 1942.

WILLIAM FLEET PALMER

United States Attorney

By ARMOND MONROE JEWELL

Attorneys for Respondent.

[Title of Circuit Court of Appeals and Cause.]

**AMENDED DESIGNATION OF THE PARTS
OF THE RECORD TO BE PRINTED.**

Comes now The B. F. Goodrich Company, a corporation, the appellant in the above entitled cause, and amends its designation of the parts of the record to be printed as follows:

It is deemed necessary by appellant for the consideration of the points set forth in its statement of points filed herein, that there be printed the whole of the record on appeal, as certified by the Clerk of the District Court and filed herein (including the reporter's transcript and exhibits), but excluding the brief of plaintiff and plaintiff's reply brief filed in the lower court and also all of the defendant's reply brief filed in the lower court, except for the following quoted paragraph appearing in the next to the last paragraph of Point III of said defendant's reply brief:

“Plaintiff's only offer of proof consists of the statement of one of its officers (submitted in stipulation form). The Government objects to the materiality of these statements on the ground that they are not the best evidence to show that the tax was not passed; that the best evidence consists of the books and records of sales of plaintiff's predecessor.”

Dated this 26th day of February, 1942.

NEWLIN & ASHBURN

RAY J. COLEMAN

Counsel for Appellant, The
B. F. Goodrich Company

[Endorsed]: Filed Feb. 27, 1942. Paul P.
O'Brien, Clerk.

No. 10035

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

THE B. F. GOODRICH COMPANY, a
corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States Circuit Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Wednesday, October 21, 1942.

Before: Denman, Mathews and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Hudson B. Cox, counsel for appellant, and by Mr. Warren F. Wattles, Special Assistant to the Attorney General, counsel for appellee, and submitted to the court for consideration and decision with leave to counsel for appellee to file supplemental brief, and with leave to counsel for appellant to reply in 10 days after service of said brief.

United States Circuit Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Saturday, February 20, 1943.

Before: Denman, Mathews and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER GRANTING PETITION FOR
REHEARING, ETC.

Upon consideration of the petition of appellant, filed January 16, 1943, for a rehearing of above

cause, and by direction of the Court, It Is Ordered that such petition for rehearing be, and hereby is granted, that the opinion of this Court heretofore rendered and filed on December 15, 1942, be, and hereby is withdrawn, and that the judgment filed and entered on December 15, 1942, be, and hereby is vacated and set aside.

It Is Further Ordered that this cause hereby is resubmitted to the Court for consideration and decision on the briefs heretofore filed and oral arguments had herein.

United States Circuit Court of Appeals
For the Ninth Circuit

Excerpt from Proceedings of Tuesday, April 13, 1943.

Before: Denman, Mathews and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF
JUDGMENT

By direction of the Court, Ordered that the type-written opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

OPINION

Before: Denman, Mathews and Stephens,
Circuit Judges.

Stephens, Circuit Judge.

On Rehearing.

This is an appeal from a judgment of the United States District Court in favor of the Government, upon a suit for recovery of additional manufacturer's excise tax assessed against and paid by appellant's predecessor in interest, Pacific Goodrich Rubber Company.

The action was tried upon a stipulation of facts, and no dispute exists between the parties thereon. The Pacific Goodrich Rubber Company, a Delaware corporation (herein referred to, for convenience, as the "Pacific Company"), was at all times prior to its dissolution the wholly owned subsidiary of appellant, the B. F. Goodrich Company (herein referred to as the "Goodrich Company").

Pursuant to Section 16 (a) of the Agricultural Adjustment Act¹ (Act May 12, 1933, Ch. 25, Title

(1) Act May 12, 1933, Chapter 25, Title I, §16 (7 U.S.C.A. §616(a)): "Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates

I, §16; 48 Stat. 40; 7 U.S.C.A. §616), Pacific Company was required to pay a tax upon the sale or disposition of any article processed wholly or in chief value from cotton, which it had on hand on August 1, 1933 (the date the processing tax on cotton went into effect by proclamation of the Secretary of Agriculture), in an amount equivalent to the tax which would have been paid on said cotton had it actually been processed after August

with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

“(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date. * * *

“(2) Whenever the processing tax is wholly terminated, (A) there shall be refunded or credited in the case of a person holding such stocks with respect to which a tax under this chapter has been paid, or (B) there shall be credited or abated in the case of a person holding such stocks with respect to which a tax under this chapter is payable, where such person is the processor liable for the payment of such tax, or (C) there shall be refunded or credited (but not before the tax has been paid) in the case of a person holding such stocks with respect to which a tax under this chapter is payable, where such person is not the processor liable for the payment of such tax, a sum in an amount equivalent to the processing tax which would have been payable with respect to the commodity from which processed if the processing had occurred on such date.”

1, 1933, or approximately $4\frac{1}{2}$ cents per pound. This tax amounted to \$34,648.08.

During the period from August 1, 1933, through January 5, 1934, Pacific Company manufactured and sold tires which contained 705,806 pounds of processed cotton, which were in the company's inventory of August 1, 1933, and upon which the aforementioned Agricultural Adjustment Act tax had been paid. In computing the manufacturer's excise tax of $2\frac{1}{4}$ cents per pound of tires sold, imposed under §602 of the 1932 Revenue Act (26 U.S.C.A. §3400),² Pacific Company deducted from the weight of such tires the 705,806 pounds of processed cotton contained therein, on which it had paid the Agricultural Adjustment Act tax. In so doing, the Pacific Company relied on Section 92 of the Agricultural Adjustment Act (7 U.S.C.A. §609a), which provided as follows:

“Provided, That upon any article upon which a manufacturers' sales tax is levied under the authority of chapter 20 of Title 26 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight

(2) Section 602, Revenue Act of 1932 (26 U.S.C.A. §3400): “There shall be imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

“(1) Tires wholly or in part of rubber, $2\frac{1}{4}$ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.”

of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid."

This computation of the manufacturers' excise tax, wherein deduction was taken for the weight of processed cotton, on which a tax had been paid under §16a of the Agricultural Adjustment Act, was disallowed by the Collector, and on April 10, 1934, demand was made for an additional manufacturers' excise tax computed at the rate of 2¼ cents per pound on the 705,806 pounds of processed cotton contained in the tires which had been sold, amounting to \$15,880.64, together with interest thereon in the sum of \$569.74. Pacific Company paid this additional tax under protest.

Thereafter, and on June 30, 1934, Pacific Company executed an assignment to Goodrich Company of "all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable including, but without limiting the generality of the foregoing, all bills or accounts receivable, outstanding contracts, insurance policies, bank accounts, stocks, bonds, or other interest in other firms, companies and/or businesses, also all cash, trade marks, trade names, patents, leases, merchandise, raw materials, supplies and equipment."

On July 6, 1934, the Board of Directors of Pacific Company met and adopted the following resolution:

“Resolved, that in the judgment of this Board of Directors it is advisable and most for the benefit of Pacific Goodrich Rubber Company that said corporation should be dissolved, and to that end and as required by law, that a meeting of the stockholders of said corporation be held at 500 South Main Street, Akron, Ohio, on the 6th day of July, 1934, at 2 o'clock in the afternoon to take action upon this resolution, and

“Be it further resolved, that this Board of Directors does hereby ratify the action taken by the management of this corporation in transferring to and delivering over possession to The B. F. Goodrich Company of all of the assets of this corporation at the close of business on June 30, 1934, as a distribution in kind to the stockholders of all the assets of this corporation, and hereby recommends the ratification and approval by the stockholders of such action on the part of the management of the corporation, * * *

In the minutes of the special stockholders' meeting called on July 6th, 1934, pursuant to the above resolution, the following appears:

“* * * the following resolution was unanimously adopted:

“Whereas, it is in the judgment of the stockholders of this corporation advisable and most for the benefit of the corporation that the corporation be dissolved, as recommended by reso-

lution of its Board of Directors at a meeting duly called and held,

"Now, therefore, be it resolved that the proper officers of the corporation are hereby authorized and directed to obtain the execution by all of the stockholders of the corporation of a certification of dissolution by unanimous consent, and to file said certificate with the Secretary of State of the State of Delaware.

"The Chairman then announced that the corporation, acting through its officers, had transferred and delivered over to The B. F. Goodrich Company at the close of business on June 30, 1934, all of its assets in anticipation of the immediate dissolution of the company. Thereupon, on motion duly made and seconded, it was by unanimous vote

"Resolved that the stockholders of this corporation do hereby unanimously ratify and approve the action of the management of the corporation in transferring and delivering over to The B. F. Goodrich Company at the close of business on June 30, 1934, possession and control of all of the property and assets of the corporation as a distribution in kind of all of the assets of the corporation to its stockholders, all of its issued and outstanding stock being owned and/or controlled by said The B. F. Goodrich Company, and

"Be it further resolved that the President or a Vice President and the Secretary or an Assistant Secretary be and they hereby are au-

thorized to execute in the name and on behalf of the corporation a good and sufficient deed of conveyance of all of the real estate of this corporation to The B. F. Goodrich Company, and to perform and execute all such further acts and assignments of bills and accounts receivable or other instruments as may be necessary or convenient to vest in The B. F. Goodrich Company full and complete title to all of the assets of this corporation."

Thereafter, and on August 24, 1934, another meeting of the Board of Directors of Pacific Company was held, at which the following resolution was adopted:

"Resolved, that the Directors of this corporation do hereby unanimously ratify and approve the execution and delivery by the President and Secretary of the corporation of a certain assignment, dated June 30, 1934, transferring and setting over unto The B. F. Goodrich Company all rights, claims, and choses in action of every nature and description which the corporation now has or shall have against any and all persons, firms or corporations, whether now due and payable or hereafter becoming due and payable * * *."

The certificate of dissolution of Pacific Company referred to in the foregoing resolutions, was filed in the office of the Delaware Secretary of State on December 21, 1934.

On August 14, 1935, after its dissolution, Pacific

Company executed another assignment in favor of the Goodrich Company of "all claims, demands, choses in action or cause or causes of action of whatsoever kind and nature which it has or which may later accrue against all persons whomsoever, particularly its claim for refund of excise tax illegally paid to the United States Government from and after April 17, 1934, in the sum of \$16,450.39, or any one sum finally found to be due, together with interest thereon."

On August 31, 1935, the Goodrich Company filed with the Collector of Internal Revenue a claim, and on April 21, 1936, it filed an amended claim, for refund of the taxes paid under protest as above set out, in each of which claims the following statement appears:

"The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to the B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter."

Both the original and amended claims for refund were disallowed by the commissioner on May 22, 1936, and on October 1, 1937, the Goodrich Company filed its original complaint in this action seeking judgment against the Government for the taxes

allegedly overpaid. In this original complaint the assignment from the Pacific Company, dated June 30th, is set out at length, as are the claims filed by the Goodrich Company, with the Commissioner of Internal Revenue.

The Government demurred to the complaint upon the ground, *inter alia*, that "it does not appear from the bill of complaint * * * that a valid assignment has been made of the subject matter of the claim alleged in said bill by the Pacific Goodrich Rubber Company to complainant herein as required by Section 203, Title 31 U. S. Code; and that it affirmatively appears from the face of said bill of complaint as required by said Title 31, Section 203 U. S. Code * * *."

An amendment to the complaint was thereafter filed by the Goodrich Company, in which the assignment of August 14, 1935, was set out at length. The Government again demurred upon the same grounds as previously, and the court overruled the demurrer.

The Government filed an answer to the complaint, after which, by stipulation of the parties, the Goodrich Company filed its first amended complaint, in which, for the first time, it is alleged that it

"* * * became by operation of law, pursuant to a distribution in kind to it by Pacific Goodrich Rubber Company, the sole owner of and vested with the title to all the rights, claims and choses in action of every nature and description, which the Pacific Goodrich Rubber Company then had against all persons, firms

or corporations, whether then due and payable or to become due or payable."

The two assignments of June 30, 1934, and August 14, 1935, were set out at length "as physical evidence, affirmative proof and in confirmation of the above and foregoing" (the distribution in kind referred to in the paragraph of the amended complaint above quoted).

After trial the District Court found in favor of Goodrich Company on the merits of its action, but denied recovery on the ground that the assignment by which the Goodrich Company acquired title to the claim against the Government was void under the terms of §3477, Revised Statutes; §203, Title 31, U.S.C.A., which reads:

"Assignments of claims void. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the

person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. * * *

Admittedly, neither the assignment of June 30, 1934, nor the one of August 14, 1935, was executed with the formalities required by the above quoted section, but the Goodrich Company urges that it obtained title to the claim by operation of law by virtue of its sole ownership of the stock of Pacific Company and the dissolution of the latter company, and therefore that the code section is inapplicable. It is not necessary to decide the question since we believe appellant's claim for refund insufficient.

We have quoted from each of the claims filed by the Goodrich Company with the Commissioner; in each the Company asserted that it obtained the right to the refund by virtue of the assignment of June 30, 1934. We also pointed out that the Goodrich Company first contended that it obtained the right to the refund by operation of law in the first amended complaint, filed in February, 1940, just prior to the trial.

As noted by the Trial Judge, this resulted in a variance between the Goodrich Company's amended complaint and the claims for refund which had been filed with the Commissioner of Internal

Revenue and rejected by him. The trial court, however, took the position that this variance was "not occasioned by failure to comply with statutory requirements but rather to the requirement of the Treasury regulations which state that claims for refund must set forth in detail each ground upon which they are made, and facts sufficient to apprise the Commissioner of the exact basis thereof." Appellant contends that that part of the regulations applicable to the instant case³ was not in effect at the time the amended claim was filed with the Commissioner. Regardless of the conditions imposed by the regulations, the taxpayer at the time in question could not advance one ground for re-

(3) Treasury Regulations 46, Article 71: "Credits and refunds.—* * *

"If any person overpays the tax due with one monthly return, he may either file a claim for refund on Form 843 or take credit for the overpayment against the tax due with any subsequent monthly return. In all cases (except those referred to in section 621 (a), discussed under the preceding paragraphs of this article) where a person overpays tax, no credit or refund shall be allowed, whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has either repaid the amount of the tax to the ultimate purchaser of the article or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. * * *

fund in his claim to the Commissioner and another in his complaint to the District Court.

Revised Statutes §3226, as amended by §1103 of the Revenue Act of 1932,⁴ requires that a claim for refund of taxes be duly filed. The provision appears in Title IX of the Act of 1932, "administrative and General Provisions," and therefore applies to all the preceding titles including Title IV, "Manufacturers' Excise Taxes."

The only logical conclusion that can be drawn from consideration of §3226 is that the claim for refund, which must be filed with the Commissioner as a condition precedent to maintaining a suit for recovery of a tax, is the identical claim upon which said suit must be based. As has already been pointed out, the claim originally propounded in appellant's amended claim of April, 1936, was dissimilar to that asserted in its first amended petition of February, 1940.

The conclusion is supported by the leading case of *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 272, 51 Sup. Ct. 376, 75 L. Ed. 1025. There, the court states in connection with §1318 of the Revenue Act of 1921, which was substantially the same as §3226 under consideration herein: "The

(4) Revised Statutes §3226, as amended by §1103, Revenue Act of 1932: "No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *"

claim for refund, which §1318 makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded." The court further remarked on page 273: "Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right.'"

Upon the assumption that the variance was one which might be waived by the Commissioner, the trial court proceeded to find that "The Commissioner * * * appears to have rejected all claims for refund upon the broad ground that no right to refund existed in the taxpayer or the plaintiff under the Commissioner's interpretation of §9a of the Agricultural Adjustment Act, and the failure of the United States to insist at any time upon the literal compliance with the regulations is tantamount to a waiver in that regard."

We express no opinion herein as to the correctness of the trial court's assumption that the variance was one which the Commissioner might waive,⁵ for the reason that we find nothing in the record to support a finding that the Commissioner did

(5) But see *United States v. Andrews*, 302 U.S. 517, 58 Sup. Ct. 315, 82 L. Ed. 398; *United States v. Garbutt Oil Co.*, 302 U.S. 528, 58 Sup. Ct. 320, 82 L. Ed. 405.

waive the incompleteness of the claim as originally filed.

The Goodrich Company first urges as evidence of a waiver on the part of the Commissioner that the Commissioner rejected the claims on the merits. But the record discloses that this is only partially true.

The letter of rejection from the Commissioner reads:

"Reference is made to your claim for refund of \$16,450.39, representing tax and interest paid by the Pacific Goodrich Rubber Company, 5400 E. 9th Street, Los Angeles, California, under the provisions of section 602 of the Revenue Act of 1932.

"It is stated that you are entitled to the refund of the above tax since the Pacific Goodrich Rubber Company sold, assigned, transferred and set over to you all its rights and claims. It is contended that the Pacific Goodrich Rubber Company erroneously paid manufacturers' excise tax in the amount claimed for the reason that floor tax was paid on the cotton content of the tires in question.

"There is on file in this office a claim filed by the Pacific Goodrich Rubber Company for refund of the above tax, based on the same contentions. This claim is therefore a duplicate claim and is rejected in full."

This obviously is not a rejection of Goodrich Company's claim on the merits, as urged by the Company and as indicated by the trial court.

The record discloses that there were claims for a refund of the same tax filed by the Pacific Company, and these claims were rejected on the merits by the Commissioner. But, of course, a rejection of claims filed by the person who actually paid the tax could not possibly be construed as a waiver of the lack of proper description of the assignment in the claim filed by Goodrich Company. There would be no occasion to go into the assignment at all, when considering the claim as one filed by the taxpayer. Indeed, it might well be argued that in rejecting the claim of Goodrich Company and considering the claim of Pacific Company, the Commissioner was taking the position that the assignment to Goodrich was invalid and that the right to refund, if any, still remained in the person who paid the tax.

It is also urged by Goodrich Company that the Government waived the form of the claim in the trial before the District Court. We do not agree. The Government demurred to the complaint on the very basis that the assignment was invalid and that the complaint therefore did not state a cause of action. The demurrer was overruled, and the Government answered the complaint. But, in so answering, it did not lose its right to challenge the validity of the assignment, as disclosed by the claim.

In the amended complaint filed by the Goodrich Company it was alleged that the claim, which was set out in *haec verba*, had been "duly filed" with the Commissioner. No denial of this allegation

was contained in the Government's answer, and Goodrich Company urges that this resulted in the Government's waiving all matters concerning the form of the claim. In our opinion, there is no merit in this argument of the Goodrich Company, for the admission of the "due filing" of a claim set out in full in the complaint could not possibly include an admission concerning the sufficiency of the claim.

There having been no waiver, it is clear that the Government is within its rights in now asserting as a defense to the instant action that the claim presented to the Commissioner did not include the present position being taken by the Goodrich Company that it is entitled to the refund by virtue of an assignment by operation of law, as contracted with the assignment of June 30, 1934. *Tucker v. Alexander*, 275 U.S. 228, 48 Sup. Ct. 45, 72 L. Ed. 253; *United States v. Felt and Tarrant Co.*, 283 U.S. 269, 51 Sup. Ct. 376, 75 L. Ed. 1025.

Affirmed.

[Endorsed]: Opinion. Filed Apr. 13, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10035

THE B. F. GOODRICH COMPANY, a
corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered April 13, 1943.
Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED
UNDER RULE 38 OF THE REVISED
RULES OF THE SUPREME COURT OF
THE UNITED STATES**

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing three hundred two (302) pages, numbered from and including 1 to and including 302, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 27th day of May, 1943.

[Seal]

PAUL P. O'BRIEN,

Clerk

SUPREME COURT OF THE UNITED STATES**ORDER ALLOWING CERTIORARI—Filed October 11, 1943**

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8983)

FILE COPY

Office - Supreme Court, U. S.

FILED

JUL 13 1943

CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. 158

THE B. F. GOODRICH COMPANY, *Petitioner*,

v.

UNITED STATES, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

E. BARRETT PRETTYMAN

F. G. AWALT

RAYMOND SPARKS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1942.

No. _____.

THE B. F. GOODRICH COMPANY, *Petitioner*,

v.

UNITED STATES, *Respondent*.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, The B. F. Goodrich Company, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above-entitled cause on April 13, 1943; and affirming, on different grounds, a judgment for the United States District Court for the Southern District of California, Central Division.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 285-301) is not yet reported. The opinion of the District Court (R. 95-108) is reported at 48 F. Supp. 433.¹

JURISDICTION.

The judgment of the Circuit Court of Appeals (R. 302) was entered on April 13, 1943. This petition was filed in this Court on or before July 13, 1943 (see clerk's file mark). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and on 28 U. S. C. § 350.

STATUTES INVOLVED.

The pertinent parts of the statutes involved are set forth in the Appendix, *infra*, pp. 23-24.

STATEMENT.

The questions presented by this petition (see p. 12, *infra*) arise from the holding of the Circuit Court of Appeals that there was a fatal variance between petitioner's First Amended Petition, upon which the case was tried, and the claims for refund which petitioner submitted to the Commissioner of Internal Revenue. In so far as they bear on these questions, the facts, pleadings, proceedings on trial, and decisions of the courts below may be summarized as follows:

1. **FACTS.**² From August 1, 1933, to January 5, 1934, Pacific Goodrich Rubber Company, a wholly owned subsidiary of petitioner (R. 82, 142), manufactured and sold tires containing 705,806 pounds of processed cotton on which it paid

¹ The District Court's findings of fact (R. 140-152) and conclusions of law (153-161) are not reported.

² The facts and certain of the exhibits were stipulated (R. 80-92, 159-160).

to the Collector of Internal Revenue the "floor tax" provided for by Section 16(a) of the Agricultural Adjustment Act of 1933, 48 Stat. 40, 7 U. S. C. § 616(a)³ (R. 86-87, 143-145). In computing the manufacturer's excise tax imposed upon these tires by Section 602(1) of the Revenue Act of 1932, 47 Stat. 261, 26 U. S. C. § 3400,⁴ Pacific Goodrich Company (hereafter referred to as "Pacific") deducted from the gross weight of such tires the 705,806 pounds of processed cotton on which it had paid the "floor stock" tax (cf. R. 87-88 with R. 145). In making this deduction against the excise tax, Pacific relied upon proviso of Section 9(a) of the Agricultural Adjustment Act, '48, Stat. 35, 7 U. S. C. § 609(a)⁵ (R. 148, 90-91).

The Collector of Internal Revenue (John B. Carter⁶) on April 10, 1934, disallowed Pacific's deduction of the weight of the processed cotton from the gross weight of the tires in computing the excise tax, and demanded, as an additional excise tax, the sum of \$15,880.64, which was arrived at by applying the rate of the excise tax to the weight of the processed cotton deducted by Pacific in its computation of the tax. In addition, a penalty of \$569.74 was assessed (R. 88, 146, 93-94, 196-197). Pacific paid the additional assessment⁷ and the penalty, which together totalled \$16,450.39, in April and July, 1934 (R. 146-147, 89). No part of the additional

³ See p. 23, *infra*.

⁴ See p. 24, *infra*.

⁵ The proviso reads as follows: "Provided, that upon any article upon which a manufacturer's sales tax is levied under the authority of the Revenue Act of 1932, and which manufacturer's sales tax is computed on the basis of weight, such sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid." (Italics supplied.)

⁶ Mr. Carter died prior to the commencement of the action (R. 80, 142), which, therefore, was brought against the United States.

⁷ It was stipulated (R. 257) that the additional excise tax, though demanded of and paid by Pacific, was never formally assessed against it. However, for convenience sake we shall refer to the tax as an assessment.

tax or penalty has been refunded either to Pacific or to petitioner (R. 150).

At the close of business on June 30, 1934, Pacific delivered possession of all of its assets to the petitioner as sole owner of Pacific's stock (R. 147, 93-94, 225, 227). Also on June 30, 1934, Pacific, by its President and Secretary, executed an assignment by which it assigned "to The B. F. Goodrich Company . . . all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have" (R. 83, 148, 52, 93, 191-193). This assignment was ratified by Pacific's Board of Directors and stockholders on July 6, 1934 "as a distribution in kind of all of the assets of the corporation as a distribution in kind of all of the assets of the corporation to its stockholders, all of its issued and outstanding stock being owned and/or controlled by The B. F. Goodrich Company . . ." (R. 147, 93-94, 225, 227, 230). At the same time the stockholders directed the officers of the corporation to convey to petitioner all of Pacific's real estate (R. 147, 93-94, 225, 230-231), and to take the measures necessary to dissolve the corporation (*ibid*). Pursuant to the latter direction, Pacific was dissolved on December 21, 1934 (R. 81, 141, 93-94, 233-235). In addition, the directors of that corporation executed on behalf of the corporation an assignment, dated August 14, 1935, under the terms of which it did "sell, assign, and transfer" to petitioner "all claims, demands, choses in action or cause or causes of action of whatsoever kind" including "particularly its claims for refund of excise tax illegally paid to the United States . . . in the sum of \$16,450.39" (R. 83, 148; 54-55, 93-94, 194-195).

On August 31, 1935, Pacific and petitioner each submitted a claim for refund of the additional manufacturer's excise tax which had been assessed against Pacific (see p. 3, *supra*). Both of these claims were predicated on the ground that Pacific in computing the excise tax on the tires which it sold was entitled under the proviso of Section 9 (a) of

the Agricultural Adjustment Act, *supra*, to deduct from the gross weight of the tires the weight of the processed cotton contained therein on which it had paid a "floor stock" tax under Section 16(a) of that Act, *supra* (R. 89, 148, 93-94, 199-202, 209-214). In addition, petitioner stated in its claim that it was entitled to the refund by virtue of the assignment made to it by Pacific on June 30, 1934⁸ (R. 148-149, 93-94, 211-213). On April 21, 1936, both Pacific and petitioner filed amended claims which differed from the original claims only in the additional statement that Pacific had not included the taxes in the prices of the tires assessed⁹ (R. 90, 149, 93-94, 203-208, 215-220). In both of their original and amended claims, petitioner and Pacific gave their address as, 5400 E. Ninth Street, Los Angeles, California (R. 199, 204, 209, 215), and petitioner's original claim as well as both of Pacific's claims were submitted by S. M. Jett as Secretary of the respective corporations (R. 201, 207, 213).

The Commissioner of Internal Revenue on April 18, 1936 rejected Pacific's original claim (see p. 4, *supra*) on the ground that Section 9 (a) of the Agricultural Adjustment Act, *supra*, did not authorize a deduction of the weight of processed cotton on which a "floor stock" tax had been paid under the Section 16 (a) of that Act, *supra*, in the computation of the excise tax imposed on tires by Section 602(a) of the Revenue Act of 1932, *supra*.¹⁰ On May 22, 1936, the Commissioner, by letter, rejected Pacific's amended claim of April 21, 1936, for the same reason and for the additional reason that the amended claim failed

⁸ See p. 4, *supra*.

⁹ The additional assessment having been paid on April 19, 1934 (cf. R. 146 with R. 202), the bar of the statute of limitations against claims for refunds (Section 1106 (a) of the Revenue Act of 1932, 47 Stat. 287, now 26 U. S. C. § 3313) fell on April 18, 1938.

¹⁰ The Commissioner reasoned that the words "processing tax" used in the proviso (see n. 5, p. 3, *supra*) did not include within their scope the "floor stock" tax imposed by Section 16(a) (R. 223-224).

to set forth any new and material evidence. (R. 150, 93-94, 220-221, 223-224.) On the same date, the Commissioner, by a letter sent to petitioner "as successor to Pacific Goodrich Company", rejected petitioner's original and amended claim (R. 149-150, 90,^{11a} 93-94, 221-222). The material part of this letter reads as follows:

"It is stated [in petitioner's claims] that you are entitled to the refund . . . since the Pacific Goodrich Rubber Company sold, assigned, transferred and set over to you all its rights and claims. It is contended that the Pacific Goodrich Company erroneously paid manufacturer's excise tax in the amount claimed for the reason that the floor tax was paid on the cotton content of the tires in question.

"There is on file in this office a claim filed by Pacific Goodrich Rubber Company for refund of the above tax, based on the same contentions. This claim is therefore a duplicate claim and is rejected in full." (R. 222.)

2. PLEADINGS AND TRIAL. On October 1, 1937, petitioner filed in the District Court its original petition (R. 2-25) for recovery of the additional excise tax assessed against Pacific (see p. 3, *supra*). This petition alleged (R. 3-5) that on June 30, 1934, petitioner had become the owner, by assignment, of "all the rights, claims and choses in action" which Pacific had at that time. In support of this allegation, Pacific's assignment of the same date was set forth¹¹ (R. 3-5). The petition next stated that the action instituted was one for the recovery of the manufacturer's excise tax erroneously collected from it by respondent (R. 6). The remainder of the petition contained allegations of facts designed to show that the tax had been erroneously collected from Pacific and that judgment for recovery of the tax should, accordingly, be entered against respondent (R. 6-25).

^{11a} The letter of rejection is referred to in the stipulation as "plaintiff's Exhibit 'E'." However, as introduced, the letter is marked "Plaintiff's Exhibit H" (cf. R. 160 with R. 221-222).

¹¹ See p. 4, *supra*.

Respondent on December 3, 1937, met the petition with a demurrer which, on the assumption that the petition sought recovery of taxes paid under the Agricultural Adjustment Act, challenged the jurisdiction of the District Court under Sections 905 and 906 of the Revenue Act of 1936¹² and the sufficiency of the petition under the Sections 902, 903, and 904 of the same Act¹³ (R. 28-31). On April 6, 1938, the Government amended its demurrer by adding a third ground which challenged, under R. S. § 3477, 31 U. S. C. § 203 (see p. 23, *infra*), the validity of Pacific's assignment of June 30, 1934 (see p. 4, *supra*) (R. 33-34).

After the filing of the demurrer, petitioner on May 21, 1938, amended its petition by setting forth Pacific's assignment of August 14, 1935 (see p. 4, *supra*) as an "addition to" and "a supplement of" Pacific's assignment of June 30, 1934, which it had set forth in its original petition (see p. 6, *supra*) (R. 35-37). Respondent, on August 1, 1938, demurred to the petition as amended on the same grounds set forth in its original demurrer as amended (R. 39).

The District Court on October 3, 1938, overruled the demurrer (R. 40-41); and respondent on February 3, 1939, filed its answer (R. 41-48). In its first answer and defense, respondent denied (R. 42-45) the petitioner's allegation that the suit was brought for the recovery of the manufacturer's excise tax and all petitioner's allegations going to the illegality of the tax assessed against Pacific. In its second answer and defense (R. 45-48), respondent set out as an affirmative defense that the suit was one for the recovery of taxes paid under the Agricultural Adjustment Act and that petitioner was not entitled to recovery since neither it nor Pacific had complied with the provisions of the Revenue Act of 1936 governing claims for refunds of taxes paid under the former Act.¹⁴ At no point in the answer was it al-

¹² 49 Stat. 1748, 7 U. S. C. §§ 647 and 648.

¹³ 49 Stat. 1747, 7 U. S. C. §§ 644, 645 and 646.

¹⁴ Respondent also set out as an affirmative defense that no refund could be had under the Agricultural Adjustment Act because that Act had been declared unconstitutional (R. 48).

leged that there was a variance between the claim for refund and the petition as amended.

Thereafter, on February 5, 1940, petitioner filed its First Amended Petition (R. 50-78) which, so far as here material, differed from the original petition (see p. 6, *supra*) and its amendment (see p. 7, *supra*) only in alleging that petitioner, as the sole shareholder of Pacific, became entitled on June 30, 1934, "to all rights, claims and choses in action" possessed by Pacific on that date "by operation of law, pursuant to a distribution in kind to it by Pacific" at that time. (R. 51). Pacific's assignments of June 30, 1934, and August 14, 1935 (see p. 4, *supra*), were set out at length "as physical evidence, affirmative proof and confirmation of this allegation" (R. 51-56). Prior to the filing of this "First Amended Petition", the parties stipulated that the original petition as amended might be "amended in the particulars as set forth in [petitioner's] First Amended Petition" and that respondent's answer to the original petitioner's amendment "shall in all particulars be deemed to be * * * an answer to [petitioner's] First Amended Petition in all particulars and with the same * * * effect * * * as though said answer was specific and particular answer to said First Amended Petition" (R. 78-79).

The trial (R. 185-262) consisted of little more than the submission (R. 189-190) of the Stipulation of Facts and the introduction of exhibits in evidence. However, in their opening statement, counsel for petitioner and respondent stated their views of the nature of the suit before the Court and issues arising therein. According to counsel for petitioner (R. 187-188) the suit was one for the recovery of an additional manufacturer's excise tax, and the issue was whether the words "processing tax" as used in the proviso of Section 9(a) of the Agricultural Adjustment Act (see n. 5, p. 3, *supra*) comprehended the "floor stock" tax imposed by Section 16 (a) of the same Act, *supra*. Counsel for respondent stated (R. 188-189), as to the issue suggested

ny counsel for petitioner, that it was the contention of respondent that the "floor stock" tax was not a processing tax within the terms of the proviso to Section 9 (a). He stated further that it was the respondent's position that the suit was in fact one for the recovery of taxes paid under the Agricultural Adjustment Act and that the issue was whether petitioner had complied with the statutory and administrative conditions precedent to the maintenance of such a suit. Counsel for respondent did not suggest at any point in the trial that there was a variance in petitioner's claim for refund and petitioner's First Amended Petition.¹⁵

3. DECISION OF DISTRICT COURT. The two main questions considered in the decision of the District Court (R. 95-108) were: (1) Whether the additional manufacturer's excise tax was erroneously collected from Pacific. (2) Whether petitioner was entitled to recover the tax collected from Pacific. On the first question the Court concluded that the tax had been erroneously collected (R. 95-101); on the second, that petitioner was not entitled to recover^{15a} (R. 101-108).

Before concluding that petitioner could not recover, the District Court, *ex mero motu*, raised and determined (R.

¹⁵ Nor did the trial brief submitted by respondent raise the question of variance. In fact, respondent conceded in its brief before the Circuit Court of Appeals (p. 26, n. 12) that the question of variance "was not urged by the Government in the court below."

^{15a} The Court made three subsidiary holdings in support of its main holding on this question: (1) Petitioner's right to the refund depended upon Pacific's assignments of June 30, 1934 and August 14, 1935, which, since Pacific's claim had not been allowed, its amount determined and warrants for its payment issued, were void under R. S. § 3477, *supra* (R. 103-105; cf. Conclusion of Law V, R. 155-156). (2) Petitioner was not, within the terms of Section 621 (d) of the Revenue Act of 1932, 49 Stat. 267, 26 U. S. C. § 3443(d), governing claims for refunds of manufacturer's excise taxes collected under the Act, "the person who paid the taxes" (R. 106; cf. Conclusion of Law VI, R. 156). (3) Petitioner's evidence did not satisfactorily establish, as required by Section 621 (d), *supra*, that the taxes and suit had not been included in the prices charged for the tires assessed. (R. 107-108; cf. Conclusion of Law VII, R. 156).

102-103) a question of a variance between petitioner's claims for refunds and its First Amended Petition. On this point the Court initially stated that the First Amended Petition varied from the claims for refund because in the latter petitioner's right to maintain its suit for the recovery of the taxes was predicated on Pacific's assignment of June 30, 1934, while in the former it was predicated on petitioner's ownership of Pacific's stock in addition to the assignment of June 30, 1934. The Court stated further that the variance was occasioned, not by failure to comply with the statute (R. S. § 3226, as amended by Section 1103(a) of the Revenue Act of 1932, 47 Stat. 286, 26 U. S. C. § 3772 (a)(1) (see p. 23, *infra*)) requiring that a claim for refund be submitted to the Commissioner prior to the institution of suit, but by failure to comply with the Treasury Regulation requiring that claims for refund state in detail each ground upon which they are founded together with facts sufficient to appraise the Commissioner of the exact basis of the claim.¹⁶ The Court also noted that the Commissioner appeared to have rejected petitioner's claim on the "broad ground that no right for refund existed in [petitioner]

¹⁶ The District Court did not cite the Treasury Regulation upon which it relied in raising the question of variance. However, it is obvious that it had in mind T. R. 86, Art. 322-3 promulgated under the Revenue Act of 1934 (now T. R. 101, § 19.322-3) which provided that a claim for refund "must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to appraise the Commissioner of the exact basis thereof." This regulation, however, applied to income taxes only. Prior to November 12, 1935 (petitioner's original claim was filed on August 31, 1935) T. R. 46, Art. 71 (promulgated under the Revenue Act of 1932, but not published as Treasury Decision); provided, in so far as here material, that claims for refunds of excise should contain "the reason for claiming the . . . refund" and establish that the tax was not included in the sales price of the article assessed. On November 12, 1935 (petitioner's amended claim was filed on April 21, 1936) these provisions were removed from the Regulation (see *Shotwell Manufacturing Company v. Harrison*, 27 F. Supp. 422 (D. C. N. D. Ill.); T. D. 4605, Cum. Bull. XIV-2, pp. 386-388), and were not restored until August 16, 1938 (see T. D. 4853, Cum. Bull. 1938-2, p. 383, 387-388). These provisions appear in the present regulations (see 26 C. F. R. (1940 Supp.) § 316.94).

under the Commissioner's interpretation of Section 9 (a) of the Agricultural Adjustment Act" (R. 103). The Court then held, relying on *Tucker v. Alexander*, 275 U. S. 288, that respondent had waived the variance by its failure "to insist at any time upon the literal compliance with the regulations" (R. 103).

4. **DECISION OF THE CIRCUIT COURT OF APPEALS.** In its decision (R. 285-301), the Circuit Court of Appeals affirmed the judgment of the District Court on the sole ground that petitioner's First Amended Petition varied fatally from its claims for refund.

In reaching its decision, the Circuit Court of Appeals held (R. 295-298) that R. S. § 3226, *supra*, required that a claim for refund "identical"¹⁷ with the claim upon which the suit is based be first submitted to the Commissioner of Internal Revenue as a condition precedent to the maintenance of the suit.¹⁸ It also held (R. 299-300) that the Commissioner's

¹⁷ The Court said (R. 297):

"The only logical conclusion that can be drawn from consideration of Section 3226 is that the claim for refund, which must be filed with the Commissioner as a condition precedent to maintain a suit for the recovery of the tax, is the identical claim upon which said suit must be based."

¹⁸ In reaching this conclusion the Circuit Court of Appeals relied upon *United States v. Felt & Tarrant Manufacturing Company*, 283 U. S. 269, from which the Court quoted (R. 297-298) the following passages:

"The claim for refund, which Section 1318 [of the Revenue Act of 1921, which was substantially the same as R. S. § 3226] makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the regulation, the statute is not satisfied with the filing of the paper which gives no notice of the amount or nature of the claim for which suit is brought and refers to no facts upon which it may be founded." 283 U. S. at p. 272.)

"Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right'." (283 U. S. at p. 273.)

letter of rejection (see p. 6, *supra*) did not support the conclusion that the Commissioner had denied petitioner's claims for refund on the merits,¹⁹ and thus waived a "lack of proper description of the assignment in the claim filed by petitioner" (R. 300).

Finally, the court held (R. 300-301) that respondent did not waive the variance at the trial of the case. On this point it said (R. 300):

"It is also urged by Goodrich Company that the Government waived the form of the claim in the trial before the District Court. We do not agree. The Government demurred to the complaint on the very basis that the assignment was invalid and that the complaint therefore did not state a cause of action. The demurrer was overruled, and the Government answered the complaint; but in so answering, it did not lose its right to challenge the validity of the assignment, as disclosed by the claim."

QUESTIONS PRESENTED.

1. Whether R. S. § 3226 requires that the facts and grounds ~~submitted~~ relied on in a suit to recover taxes be *identical* with the facts and grounds set forth in a claim for refund.

2. Whether the Government may on the trial of a suit to recover taxes waive a variance, the subject matter of which could have been incorporated in an amendment to a timely claim for refund, even though the statute of limitations had run against original claims for refunds.

3. Whether the Government in the trial of the suit to recover the taxes waived the variance, if any, between petitioner's claims for refund and its First Amended Petition.

¹⁹ By the term "merits" the court meant the question whether respondent had collected the taxes in suit from Pacific under an erroneous interpretation of the proviso to Section 9 (a) of the Agricultural Adjustment Act, *supra*.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that R. S. § 3226 requires that the claim relied on in the suit to recover taxes be *identical* with the claim set forth in the claim for refund submitted to the petitioner.
2. In holding that the Government did not waive the variance, if any, between petitioner's claim for refund and its First Amended Petition.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision of the Court below raises a conflict of decisions among the Circuits. Independently of the conflict of decisions, the holding of the Court below raises an important question concerning the function of a claim for refund as a condition precedent to a suit to recover taxes.

The differences between petitioner's claim for refund and First Amended Petition in respect of the grounds and factual predicate stated to show its right to claim the taxes collected from Pacific are differences springing from an amplification of details and not from a change to unrelated grounds and supporting facts. In its claims for refund petitioner's ground in support of its right to claim the taxes was an assignment to it by Pacific of all the latter's claims and choses in action. In support of this ground it alleged Pacific's assignment of June 30, 1934. In its First Amended Petition, the operative ground²⁰ in support of its

²⁰ The statement that the distribution in kind resulted in ownership of the claim by operation of law not only was a conclusion of law, and thus surplusage, but also was unsupported by the facts alleged. That the District Court was aware of this is shown by its statement that the variance arose from the allegation in the first amended Petition that Petitioner was the sole owner of Pacific's stock (R. 102).

right to claim the taxes was a distribution in kind to it of all of Pacific's claims and choses in action. In support of this ground, it alleged that it was the sole owner of Pacific's stock and that the assignment of June 30, 1934,²¹ which was set out at length, was made as a distribution in kind to it of all of Pacific's claims and choses in action. Thus, the two grounds were not inconsistent or unrelated, but germane,²² the ground of the petition²³ springing from the ground of the claim when viewed in light of two additional facts which were not inconsistent with the factual predicate of the claim. In view of the nature of the differences between the claim for refund and the First Amended Petition in respect to the variance which the Court below held to be fatal, it is obvious that a literal meaning must be given to the Court's holding that the claim on which a suit to recover taxes is grounded must be "identical" with the claim asserted in the claim for refund; that is to say, the Court must be taken to have held that a claimant suing to recover taxes is limited to the precise grounds and facts of its claim for refund. This stringent holding gives rise to a conflict of decisions among the Circuits.

If it were true that the claim in suit must be thus identical with the claim stated in the claim for refund, the Third Circuit could not have held in *Bethlehem Baking Co.*

²¹ The assignment of August 14, 1935, as stated by the District Court (R. 102) had no operative significance over the assignment of June 30, 1934.

²² This distinguishes the instant case from *United States v. Felt and Tarrant Company*, 283 U. S. 286, upon which the Court below relied (see page 11, *supra*) in holding that a claim for refund must be identical with the claim submitted in a suit to recover taxes.

²³ A distribution in kind of its assets by a corporation to its stockholders is sufficient to transfer the corporation's claims for refunding taxes, such a transfer not being rendered void by R. S. § 3447, *supra*. *Novo Trading Company v. Commissioner*, 113 F. (2) 320.

v. *United States*, 129 F. (2d) 490, 493,²⁴ that a taxpayer may, in support of a suit to recover taxes, introduce evidence not submitted to the Commissioner in the taxpayer's claim for refund. Similarly, the Fifth Circuit could not have held in *Bass v. Hawley*, 62 F. (2d) 721, 724, that the discrepancy between the amended pleading and the claim for refund was "but a difference in detail, not calculated to occasion a surprise"; nor could the same Court in *Snead v. Elmore*, 59 F. (2d) 312, 314, when determining the limits of permissible variation between the claim in suit and the claim stated in the claim for refund, have stated that it was not necessary that "the claim for refund must have contained all the evidence and argument that is offered in suit," but only "the substantial grounds" and "the general facts supporting the grounds," "so that they may be fully investigated." And the Sixth Circuit could not have held in *Lucas v. Fidelity and Columbia Trust Co.*, 89 F. (2d) 945, 947, that the terse claim for refund submitted by the Trustee of Ewald's estate was in "substance" the basis of the Trustee's suit in the lengthy and complicated litigation following the Commissioner's review of the claim.

²⁴ This case was decided under Sections 903 and 904 of the Revenue Act of 1936, 49 Stat. 1747, 7 U. S. C. §§ 644, 645, governing claims for recovery of floor stock taxes paid under Section 16(a) of the Agricultural Act, *supra*, and suits to recover the taxes in the event of a rejection of the claim for refund by the Commissioner. Section 903 provides that "No refund shall be . . . allowed . . . unless . . . a claim for refund be filed by such person in accordance with Regulations prescribed by the Commissioner with the approval of the Secretary." Section 904 provides that no suit shall be brought before the expiration of eighteen months from the filing of the claim with the Commissioner, unless he render a decision within that time; or after the expiration of two years from the Commissioner's rejection of the claim. Thus the requisites provided for the recovery of a floor stock tax by suit are the same as those provided for the recovery of other taxes by R. S. § 3226, *supra*. It was the Congressional intent that they should be. Cum. Bull. 1939-1 (Part 2) (S. R. 2156, 74th Cong., 2nd Sess.), pages 699-700. It follows that Sections 903 and 904 are in *pari materia* with R. S. § 3226 in so far as the question of the sufficiency of a claim for refund to support a suit to recover taxes is concerned.

Independently of the conflict of decisions, the holding of the Court below raises a question of importance concerning the function of a claim for refund as a condition precedent to a suit to recover taxes.

It is, of course, undoubted that a claim for refund is a condition precedent to a suit to recover taxes (*United States v. Kales*, 314 U. S. 186, 193). But is it, as would follow from the rigorous holding of the Circuit Court of Appeals, a condition precedent in the sense that a suit to recover taxes is limited to the precise grounds and facts of the claim, thus making the suit no more than a judicial review of the precise statement of the case as in the claim for refund? This, obviously, is not so, for a suit may be brought on grounds not stated in the claim for refund in the event of a waiver by the Government (*Tucker v. Alexander*, *supra*, pp. 230-231). Also, a formal claim for refund is not even a requisite to a suit to recover taxes, if the Commissioner, on the basis of an informal claim, defective for lack of particularity, has investigated the grounds urged in the suit to recover taxes (*Bonwit Teller and Co. v. United States*, 283 U. S. 258, 265; *United States v. Kales*, *supra*, p. 197). Again, new facts may be asserted on the suit if they do not occasion surprise on the part of the Government (*Bass v. Hawley*, *supra*, p. 724). These cases, and others, suggest the true function of a claim for refund as a condition precedent to the maintaining of a suit to recover taxes. That function is to invite (*Snead v. Elmore*, *supra*, p. 314) and facilitate (*Tucker v. Alexander*, *supra*, p. 321), in the interest of a proper administration of the revenue (*United States v. Felt and Tarrant Company*, *supra*, p. 272), investigation (cf. *United States v. Garbutt Oil Company*, 302 U. S. 528, 532-533; *United States v. Andrews*, 302 U. S. 517, 524) by Government officials of the grounds and facts supporting the rights asserted by claimants seeking to recover taxes, to the end that errors made by the officials may be corrected without the necessity of litigation, and, if that is impossible, to aid the officials to prepare for the trial of the

suit to recover taxes (*Tucker v. Alexander, supra*, p. 314; *A. G. Reeves Steel Company v. Weiss*, 119 F. (2) 472, 476).

Viewed in this light, petitioner submits that the sufficiency of a claim for refund as a condition-precedent to a suit for recovery of taxes is not to be judged alone by a comparison of the ^{precise} grounds and facts stated in each, but in terms of broader considerations, among which would be: Did the claim adequately put the Commissioner on notice as to the fact of the claim and its general nature, pointing to the factual basis? Did the claim for refund initiate an investigation by the Commissioner which substantially disclosed the grounds and supporting facts relied on in the suit? Would the claim have initiated such an investigation but for the fact that the Commissioner denied the claim for reasons not touching the grounds and supporting facts stated therein? Did a failure to set forth the grounds and supporting facts in detail mislead the Commissioner in his consideration of the claim, or occasion surprise on the part of the Government on the suit to recover taxes, materially impeding its defense? Is the difference between the claim before the Commissioner and the claim in suit one of kind or of detail?

Without elaborating at length, petitioner submits that a major part of these considerations are operative and controlling in the instant case. The Commissioner was fairly put on notice of the nature of petitioner's claim; he was advised of both the substantive and procedural contention involved.²⁵ Any investigation of the merits of petitioner's asserted right to claim a refund of the taxes would have concerned the authority of Pacific's President and Secretary to execute the assignment relied on in support of that right, and the record showing this authority (see p. 4, *supra*) also disclose the details constituting the difference between the claim and the First Amended Petition: that petitioner was the sole stockholder of Pacific and that as-

²⁵ That is, the Commissioner was informed of the contention that the tax had been illegally collected from Pacific and of the contention that petitioner was entitled to recover it.

signment was made as a distribution in kind of all of Pacific's claims and choses in action. Thus, the transaction of which notice was given in the claim for refund pointed unerringly to the details added on suit. The failure to set them forth did not in any way impede the Commissioner's considerations of the claim, for his consideration did not, as the letter of rejection (see p. 6, *supra*) shows, involve the procedural contention. Nor was the Government surprised at the trial, for it readily stipulated that the pleading containing the added details might be filed, and neither then nor later objected on the ground of surprise.

Petitioner respectfully submits that it is of importance to the rights of taxpayers that the holding of the court below be examined by this Court. If it is true, as would follow from the holding of the court below, that a technical variance between a claim for refund and a claim advanced in a suit to recover taxes precludes the taxpayer's right of recovery, it will be necessary for a taxpayer to abandon the practice of considering a claim for refund as a means of directing the Commissioner's attention to the grounds and facts in support of the taxpayer's asserted right which need to be investigated, and to consider a claim for refund in the nature of a case made before an administrative agency in preparation for judicial review, necessitating a laborious exposition of grounds and the setting forth of multitudinous evidence. It goes without saying that if the flexible procedure formerly thought to obtain must be abandoned, the proceeding on a claim for refund will indeed become "a trap for the unwary."

II.

The novel question is presented whether the Government may waive a variance, the subject matter of which could be made the subject of an amendment to a timely claim for refund after the statute of limitations on original claims has run.

Petitioner has urged above that the opinion of the Circuit Court of Appeals raises a question of importance concerning the function of a claim for refund as a condition precedent to a suit to recover taxes. Subsumed in this argument is the contention that petitioner's claims for refund did not vary fatally from its First Amended Petition. Petitioner will contend below that if there was a variance, the decision of the Court below that it was not waived by the Government is in conflict with the decision of this Court in *Tucker v. Alexander, supra*, on the question of what constitutes a waiver of a variance by the Government. However, before this question can be reached, it is necessary to consider a question not determined by the Court below; namely, the question whether the variance could be waived by the Government. This question in turn presents the novel question whether the Government on the trial of a suit to recover taxes may waive a variance, the subject matter of which could be added by an amendment to a timely claim for refund after the statute of limitations against original claims has run.

In *Tucker v. Alexander, supra*, this Court held that the variance between the grounds of Tucker's claim and the grounds of his suit had been waived. In doing so it pointed out that at the time of the waiver the statute of limitations had not run against the claims for refunds with respect to the taxes in suit, and hence the waiver of the variance did not constitute a waiver of the statute of limitations on claims for refund, but only of the statute requiring that a claim for refund be filed with the Commissioner prior to the institution of suit. It is true that in the instant case the variance concerned arose after the statute of limitations

(see n. 9, p. 5, *supra*) against claims for refunds had run. However, petitioner submits that the difference does not control; that if there was a waiver in the instant case, it was a waiver of the statute and regulations requiring that a claim for refund be filed, and not a waiver of the statute of limitations against refunds.

Though the statute of limitations had run on new claims for refund in respect of the taxes which petitioner sought to recover, and though petitioner's claims had been rejected, they were still susceptible of amendment if the Commissioner should reopen the case, provided that the facts upon which the amendment was based would have been ascertained by the Commissioner in determining the merits of the original claim (*Pink v. United States*, 105 F. (2d) 183, 187). The permission to file such an amendment, of course, does not involve a waiver of the statute of limitations against refunds. Accordingly, if a variance consists of matter which, with the Commissioner's permission, could have been included in an amendment to a timely claim for refund, a waiver by the Government of a claimant's failure to submit the subject matter of the variance to the Commissioner by proper amendment would not constitute a waiver of the statute of limitations against claims for refund, but, as in the case of *Tucker v. Alexander*, a waiver of the statutory requirement that the claim sued on be first submitted to the Commissioner.

It remains to show that the rule here contended for by petitioner has application to the facts of the instant case. This, in sum, resolves itself to showing that the subject matter of the so-called variance would have been ascertained by the Commissioner if he had investigated the merits of petitioner's claim that it was entitled to recover the taxes paid by Pacific by virtue of the latter's assignment of June 30, 1934. This, petitioner submits, is made obvious by a line of reasoning stated elsewhere in this petition; that is, that the first disclosure of such an investigation would have been the records showing the authority of Pacific's President and Secretary to execute the assign-

ment, and that these records would have shown the subject matter of the alleged variance: that petitioner was the sole owner of Pacific's stock and that the assignment was a distribution in kind.

III.

The decision of the Court below on the question of whether the Government waived the variance on the trial conflicts with the decision of this Court in Tucker v. Alexander, supra.

On the trial of the *Alexander* case, Tucker abandoned the grounds stated in his claims for refund and asserted a new one. The Government neither objected to the resulting variance nor in words waived it, but proceeded to meet the new ground with argument and evidence. Toward the end of the trial counsel for the Government and Tucker stipulated orally (see p. 24, *infra*) the amount to which Tucker would be entitled if the Court should find in his favor on the new ground urged at the trial. In view of the failure on the part of counsel for the Government to raise the question of variance during the trial and of his entering into the stipulation, this Court held that the Government had waived the variance.

The source of the variance which the Court below held to be fatal was petitioner's allegation in its First Amended Petition that it was the sole owner of Pacific's stock and its allegation that the assignment of June 30, 1934, was a distribution in kind. Counsel for the Government did not, however, object to the filing of this pleading; in fact, he entered into a stipulation that it should be filed; and in doing so he raised no question of variance. Furthermore, he did not amend the Government's answer to raise a question of variance, but left it to stand as it was when under the pleadings of petitioner there could have been no grounds upon

which to raise a question of variance,²⁶ and neither in his oral statement to the Court concerning the issues involved in the case, nor in the brief which he submitted to the trial Court for the Government, did he raise a question of variance.

Petitioner submits that the conduct of counsel for the Government in the instant case affords equally as clear a waiver of the variance as did the conduct of counsel for the Government in the *Alexander* case, and that the holding of the Court below that the variance was not waived is obviously in conflict with the decision of this Court in the *Alexander* case on the important question of what constitutes a waiver of a variance by the Government in the trial of a suit to recover taxes.

CONCLUSION.

Petitioner respectfully submits that a writ of certiorari should issue.

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Of Counsel

²⁶ The court below placed its holding (see p. 12, *supra*) that the Government did not waive the variance at the trial on the grounds that the point had been saved by the demurrer (see p. 7, *supra*) which the Government interposed to petitioner's original petition as amended (see pp. 7, 8, *supra*). The variance, however, arose only upon the filing of the First Amended Petition (see p. 8, *supra*). Since a demurrer only raises the sufficiency of the pleading to which it is directed, it is obvious that this holding of the court below is erroneous. Furthermore, the demurrer did not assert insufficiency, on grounds of variance, but only, in so far as here material, on the ground that the assignment of June 30, 1934, was void under R. S. § 3477, *supra*.

APPENDIX.

Statutes Involved

R. S. § 3226, as amended by Section 1103(a) of the Revenue Act of 1932, 47 Stat. 286, 26 U. S. C. § 3772(a)(1), reads in pertinent part as follows:

§ 3772(a)(1).—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

R. S. § 3477, 31 U. S. C. § 203, reads as follows:

§ 203.—*Assignments of claims void.* All . . . assignments made of any claim upon the United States . . . shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such . . . assignments . . . must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer. . . .

Section 602(1) of the Revenue Act of 1932, 47 Stat. 261, 26 U. S. C. § 3400, reads as follows:

Section 602.—There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

Section 16(a) of the Agricultural Adjustment Act of 1933, 48 Stat. 40, 7 U. S. C. § 616(a), provides in pertinent part as follows:

§ 616.—(a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date. . . .

Stipulation In Tucker v. Alexander, 275 U. S. 228.

Mr. Toomey [Counsel for Government]:

I think at this time we can simplify this case a little bit by making a stipulation here. It is stipulated that the value of the stock at March first, 1913, including the real estate and the dividends which were subsequently taken out based upon the net worth of the corporation was \$356.86 per share. That is the figure used by the revenue agent. It is also agreed that if the Government is correct in reducing the March first value by the amount of this real estate and the dividends, that that valuation per share will be reduced \$153.15, leaving a net March first value per share of \$203.71. I believe it is also agreed that at the date of liquidation the assets of the corporation valued upon the same basis, the stock was worth \$319.42 per share, that if the court should hold that the Government is wrong in its method of computing the March first, 1913, value, hold we were wrong entirely, that the plaintiff is entitled to judgment for \$6,642.13, the maximum of the recovery will be only \$6,642.13. The correct means of treating the \$216.26 will be reserved for the determination of the Court.

Mr. Garnett [Counsel for Tucker]:

It is understood that if the Government is wrong as counsel has stated to the handling of the dividends the amount refunded of taxes will be \$6,642.13.

Mr. Toomey: Yes, sir.

Mr. Garnett: With interest from date of payment at six per cent and if the Court should hold that the refund of \$216.26 which the Commissioner has announced in the letter the taxpayer is entitled to will not be included in the judgment, then that will be deducted from the total amount so refunded.

The plaintiff reserves and by this stipulation does not waive the question of whatever benefit he may have on goodwill value shown to have existed March first, 1913, and also existed at July 1920, but which the plaintiff contends is not distributable to the stockholders on liquidation. (See Record in No. 167, October Term 1927, pp. 64-65.) (Italics supplied)

FILE COPY



Supreme Court of the United States

Case No. 100

No. 100

The D. F. Johnson Company, Petitioner,

vs.
The United States, Respondent.

BRIEF FOR THE D. F. JOHNSON COMPANY.

David F. Johnson

Attorney for Petitioner

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**Having Perused the Briefs
Of Counsel.**

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Agricultural Adjustment Act of 1933; 48 Stat. 31 et seq.	
Proviso to Section 9(a), 48 Stat. 35, 7 U. S. C. § 609 (a)	3, 4, 5
Section 16(a), 48 Stat. 40, 7 U. S. C. § 616(a)	2, 26
Sections 902, 903, 904, 905, and 906, 48 Stat. 1747, 1748, 7 U. S. C. §§ 644-648	6

MISCELLANEOUS:

T. D. 4265, C. B. VIII-1, p. 110-1	17
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T. D. 4853, C. B. 1938-2, pp. 383, 387-388	10
T. R. 46, Art. 71	10
T. R. 86, Art. 322-3	9
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 158.

THE B. F. GOODRICH COMPANY, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

BRIEF FOR THE B. F. GOODRICH COMPANY.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 285-301) is reported at 135 F. (2) 456. The opinion of the District Court (R. 95-108) is reported at 48 F. Supp. 453.¹

JURISDICTION.

The judgment of the Circuit Court of Appeals (R. 302) was entered on April 13, 1943. The petition for writ of certiorari was filed on July 13, 1943. This Court has jurisdiction under Section 240 (a) of the Judicial Code

¹The District Court's findings of fact (R. 140-150) and conclusions of law (153-161) are not reported.

(as amended by the Act of February 13, 1925) and 28 U. S. C. §350.

STATUTES INVOLVED.

The pertinent parts of the statutes involved are set forth in the Appendix, *infra*, pp. 25-26.

STATEMENT.

The questions presented by the case arise from the holding of the Circuit Court of Appeals that there was a fatal variance between petitioner's First Amended Petition, upon which the suit for recovery of taxes was tried in the District Court, and the claims for refund of taxes which petitioner submitted to the Commissioner of Internal Revenue. In so far as they bear on these questions, the facts, pleadings, proceedings on trial, and decisions of the courts below may be summarized as follows:

1. **FACTS.**² From August 1, 1933 to January 5, 1934, Pacific Goodrich Rubber Company, a wholly owned subsidiary of petitioner (R. 82, 142), manufactured and sold tires containing 705,806 pounds of processed cotton on which it paid to the Collector of Internal Revenue the "floor tax" provided for by Section 16 (a) of the Agricultural Adjustment Act of 1933, 48 Stat. 40, U. S. C. §616 (a)³ (R. 86-87, 143-154). In computing the manufacturer's excise tax imposed upon these tires by Section 602 (1) of the Revenue Act of 1932, 47 Stat. 261, 26 U. S. C. §3400,⁴ Pacific Goodrich Company (hereafter referred to as "Pacific") deducted from the gross weight of such tires the 705,806 pounds of processed cotton on which it had paid the "floor stock" tax (cf. R. 87-88 with R. 145). In making this deduction against the excise tax, Pacific relied upon

²The facts and certain of the exhibits were stipulated (R. 80-92, 159-160).

³See p. 26, *infra*.

⁴See p. 25, *infra*.

proviso of Section 9 (a) of the Agricultural Adjustment Act, 48 Stat. 35, 7 U. S. C. §609 (a)⁵ (R. 148, 90-91).

The Collector of Internal Revenue (John B. Carter⁶) on April 10, 1934, disallowed Pacific's deduction of the weight of the processed cotton from the gross weight of the tires in computing the excise tax, and demanded, as an additional excise tax, the sum of \$15,880.64, which was arrived at by applying the rate of the excise tax to the weight of the processed cotton deducted by Pacific in its computation of the tax. In addition, a penalty of \$569.74 was assessed (R. 88, 146, 93-94, 196-197). Pacific paid the additional assessment⁷ and the penalty, which together totalled \$16,450.39, in April and July, 1934 (R. 146-147). No part of the additional tax or penalty has been refunded either to Pacific or to petitioner (R. 150).

At the close of business on June 30, 1934, Pacific delivered possession of all of its assets to the petitioner as sole owner of Pacific's stock (R. 147, 93-94, 225, 227). At the same time Pacific, by its President and Secretary executed an instrument by which it assigned, transferred, and set over "to The B. F. Goodrich Company . . . all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have . . ." (R. 83, 148, 52, 93, 191-193). This

⁵The proviso reads as follows: "Provided, that upon any article upon which a manufacturer's sales tax is levied under the authority of the Revenue Act of 1932, and which manufacturer's sales tax is computed on the basis of weight, such . . . sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a *processing* tax has been paid." (Italics supplied.)

⁶Mr. Carter died prior to the commencement of the action (R. 80, 1942), which, therefore, was brought against the United States.

⁷It was stipulated (R. 257) that the additional excise tax, though demanded of and paid by the Pacific, was never formally assessed against it. However, for convenience' sake we shall refer to the tax as an assessment.

instrument was ratified by Pacific's Board of Directors and stockholders on July 6, 1934 "as a distribution in kind of all of the assets of the corporation to its stockholders, all of its issued and outstanding stock being owned and/or controlled by The B. F. Goodrich Company . . ." (R. 147, 93-94, 225, 227, 230). At the same time the stockholders directed the officers of the corporation to convey to petitioner all of Pacific's real estate (R. 147, 93-94, 225, 230-231), and to take the measures necessary to dissolve the corporation (*ibid*). Pursuant to the latter direction Pacific was dissolved on December 21, 1934 (R. 81, 141, 93-94, 233-235).

On August 31, 1935, Pacific and petitioner each submitted a claim for refund of the additional manufacturer's excise tax which had been collected from Pacific (see p. 3, *supra*). Both of these claims were predicated on the ground that Pacific in computing the excise tax on the tires which it sold was entitled under the proviso of Section 9 (a) of the Agricultural Adjustment Act, *supra*, to deduct from the gross weight of the processed cotton contained therein on which it had paid a "floor stock" tax under Section 16 (a) of that Act, *supra* (R. 89, 148, 93-94, 199-202, 209-214). In addition, petitioner stated in its claim that it was entitled to the refund by virtue of the assignment made to it by Pacific on June 30, 1934 (R. 148-149, 93-94, 211-213).

On April 21, 1936, both Pacific and petitioner filed amended claims which differed from the original claims only in the additional statement that Pacific had not included the taxes in the prices of the tires on which the taxes had been assessed^a (R. 90, 149, 93-94, 203-208, 215-220). In both of their original and amended claims, petitioner and Pacific gave their address as 5400 E. Ninth Street.

^aThe additional assessment having been paid on April 19, 1934 (cf. R. 146 with R. 202), the bar of the statute of limitations against claims for refunds (Section 1106 (a) of the Revenue Act of 1932, 47 Stat. 287, now 26 U. S. C. § 3313) fell on April 19, 1938.

Los Angeles, California (R. 199, 204, 209, 215), and petitioner's original claim as well as both of Pacific's claims were submitted by S. M. Jett as Secretary of the respective corporations (R. 201, 207, 213).

The Commissioner of Internal Revenue on April 18, 1936 rejected Pacific's original claim on the ground that Section 9 (a) of the Agricultural Adjustment Act, *supra*, did not authorize a deduction of the weight of processed cotton on which a "floor stock" tax had been paid under Section 16 (a) of that Act, *supra*, in the computation of the excise tax imposed on tires by Section 602 (a) of the Revenue Act of 1932; *supra*.⁹ On May 22, 1936, the Commissioner, by letter, rejected Pacific's amended claim of April 21, 1936, for the same reason and for the additional reason that the amended claim failed to set forth any new and material evidence (R. 150, 93-94, 220-221, 223-224). On the same date, the Commissioner, by a letter sent to petitioner "as successor to Pacific Goodrich Company" (R. 90¹⁰), rejected petitioner's original and amended claims (R. 149-150, 93-94, 221-222). The material part of this letter reads as follows:

"It is stated [in petitioner's claims] that you are entitled to the refund : . . since the Pacific Goodrich Rubber Company sold, assigned, transferred and set over to you all its rights and claims. It is contended that the Pacific Goodrich Company erroneously paid manufacturer's excise tax in the amount claimed for the reason that the floor tax was paid on the cotton content of the tires in question.

"There is on file in this office a claim filed by Pacific Goodrich Rubber Company for refund of the above

⁹The Commissioner reasoned that the words "processing tax" used in the proviso (see n. 5, p. 3, *supra*) did not include within their scope the "floor stock" tax imposed by Section 16 (a) (R. 223-224).

¹⁰The letter of rejection is referred to in the stipulation as "plaintiff's Exhibit 'F'." However, as introduced, the letter is marked "Plaintiff's Exhibit H" (cf. R. 160 with R. 221-222).

tax, based on the same contentions. This claim is therefore a duplicate claim and is rejected in full." (R. 222.)

2. PLEADINGS AND TRIAL. On October 1, 1937, petitioner filed in the District Court its original petition (R. 2-25) for recovery of the additional excise tax collected from Pacific. This petition alleged (R. 3-5) that on June 30, 1934, petitioner had become the owner, by assignment, of "all the rights, claims and choses in action" which Pacific had at that time. In support of this allegation, Pacific's assignment of the same date was set forth¹¹ (R. 3-5). The petition further alleged that the action instituted was one for the recovery of the manufacturer's excise tax erroneously collected from Pacific and asked that judgment for recovery of the tax be entered against respondent (R. 6-25).

Respondent on December 3, 1937, met the petition with a demurrer which, on the assumption that the petition sought recovery of taxes paid under the Agricultural Adjustment Act, challenged the jurisdiction of the District Court under Sections 905 and 906 of the Revenue Act of 1936¹² and the sufficiency of the petition under the Sections 902, 903, and 904 of the same Act¹³ (R. 28-31). On April 6, 1938, the Government amended its demurrer by adding a third ground which challenged, under R. S. §3477, 31 U. S. C. § 203 (see p. 25, *infra*), the validity of Pacific's assignment of June 30, 1934 (R. 33-34).

The District Court on October 3, 1938, overruled the demurrer (R. 40-41), and respondent on February 3, 1939, filed its answer (R. 41-48). In its first answer and defense, respondent denied (R. 42-45) the petitioner's allegation that the suit was brought for the recovery of the manufacturer's excise tax and all petitioner's allegations going

¹¹See p. 3. *supra*.

¹²49 Stat. 1748, 7 U. S. C. §§ 647 and 648.

¹³49 Stat. 1747, 7 U. S. C. §§ 644, 645 and 646.

to the illegality of the tax assessed against Pacific. In its second answer and defense that the suit was one for recovery of taxes paid under the Agricultural Adjustment Act and that petitioner was not entitled to recovery since neither it nor Pacific had complied with the provisions of the Revenue Act of 1936 governing claims for refunds of taxes paid under the former Acts.¹⁴ At no point in the answer was it alleged that there was a variance between the claim for refund and the petition as amended.

Thereafter, on February 5, 1940, petitioner filed its First Amended Petition (R. 50-78) which, so far as here material, differed from the original petition and its amendment only in alleging that petitioner, as the sole shareholder of Pacific, became entitled on June 30, 1934, "to all rights, claims and choses in action" possessed by Pacific on that date "by operation of law, pursuant to a distribution in kind to it by Pacific" at that time (R. 51). Pacific's assignment of June 30, 1934, was set out at length "as physical evidence, affirmative proof and confirmation" of this allegation (R. 51-56). Prior to the filing of this First Amended Petition, the parties stipulated that the original petition as amended might be "amended in the particulars as set forth in [petitioner's] First Amended Petition" and that respondent's answer to the original petitioner's amendment "shall in all particulars be deemed to be an answer to [petitioner's] First Amended Petition in all particulars and with the same . . . effect . . . as though said answer was specific and particular answer to said First Amended Petition" (R. 78-79).

The trial (R. 185-262) consisted of little more than the submission (R. 189-190) of the Stipulation of Facts and the introduction of exhibits in evidence. However, in their opening statement, counsel for petitioner and respondent stated their views of the nature of the suit before the Court

¹⁴Respondent also set out as an affirmative defense that no refund could be had under the Agricultural Adjustment Act because that Act had been declared unconstitutional (R. 48).

and issues arising therein. According to counsel for petitioner (R. 187-188) the suit was one for the recovery of an additional manufacturer's excise tax, and the issue was whether the words "processing tax" as used in the proviso of Section 9 (a) of the Agricultural Adjustment Act (see n. 5, p. 3, *supra*) comprehended the "floor stock" tax imposed by Section 16 (a) of the same Act, *supra*. Counsel for respondent stated (R. 188-189), as to the issue suggested by counsel for petitioner, that it was the contention of respondent that the "floor stock" tax was not a processing tax within the terms of the proviso of Section 9 (a). He stated further that it was the respondent's position that the suit was in fact one for the recovery of taxes paid under the Agricultural Adjustment Act and that the issue was whether petitioner had complied with the statutory and administrative conditions precedent to the maintenance of such a suit. Counsel for respondent did not suggest at any point in the trial that there was a variance in petitioner's claim for refund and petitioner's First Amended Petition.¹⁵

3. DECISION OF DISTRICT COURT. The two main questions considered in the decision of the District Court (R. 95-108) were: (1) Whether the additional manufacturer's excise tax was erroneously collected from Pacific. (2) Whether petitioner was entitled to recover the tax collected from Pacific. On the first question the Court concluded that the tax had been erroneously collected (R. 95-101); on the second, that petitioner was not entitled to recover¹⁶ (R. 101-108).

¹⁵Nor did the trial brief submitted by respondent raise the question of variance. In fact, respondent conceded in its brief before the Circuit Court of Appeals (p. 26, n. 12) that the question of variance "was not urged by the Government in the court below."

¹⁶The Court made three subsidiary holdings in support of its main holding on this question: (1) Petitioner's right to the refund depended upon Pacific's assignments of June 30, 1943 and August 14, 1935, which, since Pacific's claim had not been

Before concluding that petitioner could not recover, the District Court, *ex mero motu*, raised and determined (R. 102-103) a question of a variance between petitioner's claims for refunds and its First Amended Petition. On this point, the Court initially stated that the First Amended Petition varied from the claims for refund because in the latter petitioner's right to maintain its suit for the recovery of the taxes was predicated on Pacific's assignment of June 30, 1934, while in the former it was predicated on petitioner's ownership of Pacific's stock in addition to the assignment of June 30, 1934. The Court stated further that the variance was occasioned, not by failure to comply with the statute (R. S. § 3226, as amended by Section 1103 (a) of the Revenue Act of 1932, 47 Stat. 286, 26 U. S. C. § 3772 (a) (1) (see p. 25, *infra*)) requiring that a claim for refund be submitted to the Commissioner prior to the institution of suit, but by failure to comply with the Treasury Regulation requiring that claims for refund state in detail each ground upon which they are founded together with facts sufficient to apprise the Commissioner of the exact basis of the claim.¹⁷

allowed, its amount determined and warrants for its payment issued, were void under R. S. § 3477, *supra* (R. 103-105; cf. Conclusion of Law-V, R. 155-156). (2) Petitioner was not, within the terms of Section 621 (d) of the Revenue Act of 1932, 49 Stat. 267, 26 U. S. C. § 3443 (d), governing claims for refunds of manufacturer's excise taxes collected under the Act, "the person who paid the taxes" (R. 106; cf. Conclusion of Law VI, R. 156). (3) Petitioner's evidence did not satisfactorily establish, as required by Section 621 (d), *supra*, that the taxes and suit had not been included in the prices charged for the tires assessed. (R. 107-108; cf. Conclusion of Law VII, R. 156).

¹⁷The District Court did not cite the Treasury Regulation upon which it relied in raising the question of variance. However, it is obvious that it had in mind T. R. 86, Art. 322-3 promulgated under the Revenue Act of 1934 (now T. R. 101, § 19.322-3) which provided that a claim for refund "must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commis-

The Court also noted that the Commissioner appeared to have rejected petitioner's claim on the "broad ground that no right for refund existed in [petitioner] under the Commissioner's interpretation of Section 9 (a) of the Agricultural Adjustment Act" (R. 103). The Court then held, relying on *Tucker v. Alexander*, 275 U. S. 228, that respondent had waived the variance by its failure "to insist at any time upon the literal compliance with the regulations" (R. 103).

4. DECISION OF THE CIRCUIT COURT OF APPEALS. In its decision (R. 285-301), the Circuit Court of Appeals affirmed the judgment of the District Court on the sole ground that petitioner's First Amended Petition varied fatally from its claims for refund.

In reaching its decision, the Circuit Court of Appeals held (R. 295-298) that R. S. §3226, *supra*, required that a claim for refund "identical"¹⁸ with the claim upon which the suit is based be first submitted to the Commissioner.

sioner of the exact basis thereof." This regulation, however, applied to income taxes only. Prior to November 12, 1935 (petitioner's original claim was filed on August 31, 1935) T. R. 46, Art. 71 (promulgated under the Revenue Act of 1932, but not published as a Treasury Decision), provided, in so far as here material, that claims for refunds of excise should contain "the reason for claiming the . . . refund" and establish that the tax was not included in the sales price of the article assessed. On November 12, 1935 (petitioner's amended claim was filed on April 21, 1936) these provisions were removed from the Regulation (see *Shotwell Manufacturing Company v. Harrison*, 27 F. Supp. 422 (D. C. N. D. Ill.); T. D. 4605, Cum. Bull. XIV-2, pp. 386-388), and were not restored until August 16, 1938 (see T. D. 4853, Cum. Bull. 1938-2, pp. 383, 387-388). These provisions appear in the present regulations (see 26 C. F. R. (1940 Supp.) § 316.94).

¹⁸The Court said (R. 297):

"The only logical conclusion that can be drawn from consideration of Section 3226 is that the claim for refund, which must be filed with the Commissioner as a condition precedent to maintain a suit for the recovery of the tax, is the identical claim upon which said suit must be based."

of Internal Revenue as a condition precedent to the maintenance of the suit.¹⁹

The Court also held (R. 300-301) that respondent did not waive the variance at the trial of the case. On this point it said (R. 300):

"It is also urged by Goodrich Company that the Government waived the form of the claim in the trial before the District Court. We do not agree. The Government demurred to the complaint on the very basis that the assignment was invalid and that the complaint therefore did not state a ~~cause~~ of action. The demurrer was overruled, and the Government answered the complaint; but in so answering, it did not lose its right to challenge the validity of the assignment, as disclosed by the claim."

QUESTIONS PRESENTED.

1. Does R. S. §3226 require that the facts and grounds relied on in a suit to recover taxes be *identical* with the facts and grounds stated in the claim for refund thereof?
2. If a variance did exist between the facts and grounds relied on in this suit and those stated in the claim for

¹⁹In reaching this conclusion the Circuit Court of Appeals relied upon *United States v. Felt & Tarrant Manufacturing Company*, 283 U. S. 269, from which the Court quoted (R. 297-298) the following passages:

"The claim for refund, which Section 1318 [of the Revenue Act of 1921, which was substantially the same as R. S. § 3226] makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the regulation, the statute is not satisfied with the filing of the paper which gives no notice of the amount or nature of the claim for which suit is brought and refers to no facts upon which it may be founded." (283 U. S. at p. 272.)

"Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right.'" (283 U. S. at p. 273.)

refund, did the Government waive the variance on the trial of the suit?

3. On the trial of a suit to recover taxes, does the Government have the power to waive a variance, the subject matter of which could have been incorporated in an amendment to a timely claim for refund even though the statute of limitations had run against the filing of an original claim for refund?

SUMMARY OF ARGUMENT.

I.

The claim for refund in this case mentioned the instrument by which a distribution in kind was effectuated, whereas the petition in the suit described the entire transaction. Such "variance" was not fatal. To serve as a condition precedent to a suit to recover taxes, a claim for refund need not set forth with complete identity the facts and grounds sued on. The claim is sufficient, even though it differs in details, if it states the grounds and reasonably apprizes the Commissioner of the facts relied upon, the grounds and facts set forth being in essentials the same as those relied on in the suit.

II.

A variance between a claim for refund and a suit to recover taxes is waived if the Government fails to object to the variance at the trial of the suit to recover taxes.

III.

When a timely claim for refund has been filed, the Commissioner has power to permit and consider a proper amendment even though the statute of limitations against an original claim for refund has run. The variance, if any, in the instant case could have been incorporated in an amendment to the timely claim for refund filed by Petitioner. The waiver of the variance by the Government was.

therefore, permissible; for it did not constitute a waiver of the statute of limitations governing the time in which a claim for refund must be filed, but the waiver of the filing of an amended claim before the Commissioner.

ARGUMENT.

I.

The claim for refund was sufficient as a condition precedent to the suit to recover taxes.

Petitioner's claim for refund and its suit to recover the taxes were both predicated on two contentions. The first, or substantive contention, was that the Collector had illegally collected the taxes in question from Pacific. The second, or procedural contention, was that petitioner had become entitled to recover the taxes paid by Pacific. The variance which the Court of Appeals held to be fatal in this case relates only to the procedural contention.

In its claim for refund, petitioner, in support of its right to proceed to recover the taxes paid by Pacific, submitted the following statement:

"The B. F. Goodrich Company is entitled to the refund claimed herein for the reason that as of June 30, 1934, Pacific Goodrich Rubber Company, a Delaware corporation, sold, assigned, transferred and set over to The B. F. Goodrich Company all its rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company then had or might have against all persons, firms or corporations, whether then due and payable or to become due and payable thereafter." (R. 211.)

In its First Amended Petition, the allegation which petitioner made in support of its right to maintain a suit to recover the taxes exacted of Pacific reads:

"That on said 30th day of June, 1934, plaintiff, as the sole shareholder of Pacific Goodrich Rubber Company and as the sole owner of all of the issued and outstanding shares of the capital stock of said Pacific

Goodrich Rubber Company, became by operation of law, pursuant to a distribution in kind to it by Pacific Goodrich Rubber Company, the sole owner of and vested with the title to all the rights, claims and choses in action of every nature and description, which the Pacific Goodrich Rubber Company then had against all persons, firms or corporations, whether then due and payable or to become due or payable." (R. 51.)

In support of this allegation, the petitioner set out at length the assignment of June 30, 1934 (R. 52-55).

An examination of these allegations shows that the sole operative distinction²⁰ between the First Amended Petition and the claim for refund is the allegation that the assignment of June 30, 1934, named in the claim for refund, effectuated a distribution in kind of all the assets to petitioner, the sole stockholder of the assignor. This is the variance which the Court below held to be fatal.

In view of the nature of the only difference between the claim for refund and the First Amended Petition, it is obvious that a literal meaning must be given to the Court's holding that the claim on which a suit to recover taxes is grounded must be "identical" with the claim asserted in the claim for refund; that is, the Court must be taken to have held that the suit to recover taxes must accord with the claim for refund, not only in essentials, but also in details. We submit that this holding of the Court below is erroneous in that it ignores the nature of a suit to recover taxes and the function of a claim for refund as a condition precedent to such suit.

Rules Governing the Sufficiency of Claims for Refund.

A suit to recover taxes is not in the nature of a judicial review to determine the correctness of an administrative determination upon scrutiny of a record made before an

²⁰The statement that the distribution in kind resulted in petitioner acquiring ownership of the claim "by operation of law" not only was a conclusion of law, and thus surplusage, but also was unsupported by the facts alleged.

administrative agency. It is an independent suit in which the question of the illegality of the contested tax is determined *de novo*. *Fidelity & Columbia Trust Company v. Lucas*, (D. C.) 7 F. (2d) 146, 149-151, cited with approval in *Wickwire v. Reinecke*, 275 U. S. 101, 105. However, by virtue of R. S. § 3226, *supra*, the filing with the Commissioner of a claim for a refund of the contested tax is a condition precedent to the prosecution of a suit to recover taxes. *United States v. Kales*, 314 U. S. 186, 193; *Savings Institution v. Blair*, 116 U. S. 200, 205-206. It is by reference to these two basic rules and to a consideration of the function of a claim for refund that the sufficiency of a claim for refund should be determined.

Since a claim for refund is a condition precedent to a suit to recover taxes, it obviously follows that the claim must give notice of the "facts upon which the suit may be founded". *Felt & Tarrant Manufacturing Company v. United States*, 283 U. S. 269, 272. But since the suit to recover taxes is a *de novo* proceeding, evidence not submitted in the claim for refund may be submitted to the Court in support of the suit. *Fidelity & Columbia Trust Company v. Lucas*, *supra*; *Bethlehem Baking Company v. United States*, 129 F. (2) 490, 493; *Snead v. Elmore*, 59 F. (2) 312, 314; *Paul Jones & Co. v. Lucas*, (D. C.) 33 F. (2) 907, 908. And details may be added on the suit. *Bass v. Hawley*, 62 F. (2) 721, 724. It also follows from the fact that a claim for refund is a condition precedent, that it must give notice of the nature of the claim for which suit is brought. *Felt & Tarrant Manufacturing Company v. United States*, *supra*. However, the suit is not confined to the "identical" grounds of the claim for refund. It is only necessary that the grounds of the suit and the grounds of the claim accord in essentials. *Lucas v. Fidelity and Columbia Trust Company*, 89 F. (2) 945, 947; *Snead v. Elmore*, *supra*.

A consideration of the function of a claim for refund as a condition precedent to a suit to recover

taxes fortifies and delineates the line of decision picked out by these cases. The function of a claim for refund is not to frame the exact bounds of contentions and evidence to be tested by an adversary proceeding. Its function is to invite²¹ and facilitate²², in the interest of a proper administration of the revenue²³, an ex parte investigation²⁴ by the Commissioner and his assistants of the grounds and facts supporting the rights asserted by claimants seeking to recover taxes, to the end that errors made in the administration of the revenue may be corrected without the necessity of litigation, and, if that is impossible, to aid the officials to prepare for the trial of the suit to recover taxes.²⁵ Necessarily, in view of its function, a claim for refund sufficiently accords with a suit to recover taxes if: (1) it adequately puts the Commissioner on notice of the fact of the claim and in general terms points to the factual basis; (2) it is reasonably calculated to initiate an investigation which would disclose the import of the amplified details of the grounds and facts set forth in the suit, or would have done so but for the fact that the Commissioner denied the claim for reasons other than the grounds and facts set out therein; (3) the difference between the claim and the suit in respect of the grounds and facts were not such as to occasion surprise on the part of the Government, thus materially impeding its defense on the trial of the suit; and (4) the differences are of detail and not of kind.

Although at the time the amended claim for refund was filed, no regulations of the Treasury Department specifying the requirements for claims for refund of these excise taxes were in effect (see n. 17, p. 9, *supra*) nevertheless,

²¹*Snead v. Elmore*, *supra*, p. 314.

²²*Tucker v. Alexander*, *supra*, p. 321.

²³*United States v. Felt & Tarrant Company*, *supra*, p. 272.

²⁴*Cf. United States v. Garbutt Oil Company*, 302 U. S. 528, 532-533; *United States v. Andrews*, 302 U. S. 517, 524.

²⁵*Tucker v. Alexander*, *supra*, p. 231; *A. G. Reeves Steel Company v. Weiss*, 119 F. (2d) 472, 476.

since the purpose of a claim is notification to the Commissioner, and since the statute authorizes the Secretary and the Commissioner to prescribe the form and contents of such claims, their definition of the requirements of a valid claim is material here. Those requirements have long been established. In March, 1929, the Secretary by regulation said as to claims for income taxes:

"The claim must set forth in detail and under oath each ground upon which a refund or credit is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof."²⁶

Such has been the rule ever since.²⁷ Claims for excise taxes must be on Form 843 and the instructions on that form use this same language. Thus the rule for a valid claim is "each ground" and "sufficient facts to apprise the Commissioner".

The Claim for Refund in this Case Was Sufficient.

Petitioner submits that the claim for refund in the instant suit, under the rules discussed above, was sufficient as a condition precedent to its suit to recover.

The substantive ground for this suit was that Pacific overpaid its manufacturer's excise tax in a certain specified particular. Since the petitioner did not itself pay the tax, an additional, procedural, ground was that the petitioner owned the right to the refund. In its claim for refund petitioner said that it was the owner by reason of an assignment dated June 30, 1934. In its petition to the Court it asserted the same procedural ground and stated the same procedural fact, but added the further elaboration that the transaction of June 30, 1934, was a distribution in kind of all assets in a complete liquidation. So far as "ground" is concerned, the procedural ground was, and is, that petitioner is the owner of the right to the refund.

²⁶T. D. 4265, C. B. VIII-1, p. 110-1, March 27, 1929.

²⁷Sec. 19.322-3 of Regs. 103; Art. 322-3 of Regs. 101, 94 and 86; Art. 1254 of Regs. 77 and 74.

Reference to the transaction of June 30, 1934, was a sufficient fact to apprise the Commissioner of the basis of the claim. The manner of acquiring title to the right is not the "ground" but is merely an explanatory factual description. When petitioner came to sue, it did not change the ground. It repeated that it was the owner of the right and became so by the transaction of June 30, 1934. Then it added the further legalistic elaboration, characterizing the transaction as a distribution of assets in kind upon a complete liquidation of the then owner.

The Commissioner was fairly put on notice of the nature of petitioner's claim; he was advised of both the substantive and procedural contentions involved. Any investigation of petitioner's asserted right to claim a refund would have concerned, first, the fact of the assignment, and, second, the authority of Pacific's President and Secretary to execute the assignment. The records showing this authority, namely, the resolutions of the directors and the stockholders, disclose the details constituting the sole differences between the claim and the First Amended Petition: that petitioner was the sole stockholder of Pacific and that the assignment was made as a distribution to it in kind of all of Pacific's claims and choses in action.

As a matter of fact the claims for refund and the instrument mentioned therein indicated on their faces that the transfer was a distribution in kind in liquidation. The transfer was of *all assets*, from Pacific Goodrich Rubber Co. to B. F. Goodrich Co., both companies having the same address and papers being signed by the same person as Secretary of both companies. Thus, the transaction of which notice was given in the claim for refund pointed unerringly to the details added on suit. The failure to set them forth did not in any way impede the Commissioner's consideration of the claim, for his consideration did not, as the letter of rejection (see p. 5, *supra*) shows, involve the procedural contention. Nor was the Government surprised at the trial. It readily stipulated that the pleading

containing the added details might be filed. Neither then nor later did it object on the ground of surprise.

It is true that a distribution of assets in kind is not ordinarily or in strict accuracy called an "assignment". But a distribution in kind involves instruments of transfer and such instruments may be called "assignments".^{27a} The instrument of June 30, 1934, was called an "Assignment" (R. 191), although in fact it was an instrument effectuating a distribution in kind, as the slightest investigation would show. The claim for refund made reference to the precise instrument; the petition in Court described the whole transaction of which the instrument was the effectuating medium. The two referred in precise words to the same transaction; both were statements of the same "ground", namely the ownership of petitioner by virtue of the June 30, 1934, transaction. Admittedly the two were not "identical" because the instrument mentioned in one was only part of the whole transaction described in the other. The Court of Appeals held that the two must be "identical". Reduced to its ultimate, the holding of the Court in this respect was that if a person at one time says he acquired property by an assignment which was a distribution in kind upon a complete liquidation of a corporation, and at another time says he acquired the property by an assignment, he has made two different statements.

The rule for which we here contend has always been the rule of practice in the Treasury Department, and it must necessarily be the rule. The Department deals with millions of individual people. A major premise of its success is the confidence of these people in its fair dealing with them. They must believe, and it must be true, that if they overpay their tax they can recover the excess. If the process of recovery be hedged about with technicalities, so

^{27a} A distribution in kind of its assets by a corporation to its stockholders, effectuated by an assignment, is sufficient to transfer the corporation's claims for refunding taxes, such a transfer not being rendered void by R. S. § 3447, *supra*. *Novo Trading Company v. Commissioner*, 113 F. (2) 320.

that the unadvised individual taxpayer can hardly be successful, a major blow has been struck at the collection of the revenue. Of course a claim for refund must reasonably apprise the Department of the nature of the claim and the facts upon which it is based. Otherwise administrative chaos would exist. But that is a far cry from the holding of the Court below in this case that a claim for refund must be identical in detail with any subsequent petition or complaint at law for the recovery of the tax. The rule which would follow from this holding of the Court below is that a claim for refund which lacks any essential of a valid petition at law is invalid. Such a rule would be disastrous in the administration of the tax law.

The Court will remember that this matter of variance was not originally raised by the Government. It was an idea of the District Court.

II.

Respondent, under the doctrine of *Tucker v. Alexander*, supra, waived the variance.

Petitioner has contended above that the Circuit Court of Appeals committed error in holding that petitioner's First Amended Petition varied fatally from its claim for refund. However, if this Court holds that there is such a variance, it is petitioner's contention that the holding of the Court below that respondent did not waive the variance is erroneous under the doctrine of *Tucker v. Alexander*, supra.

On the trial of that case, Tucker abandoned the grounds stated in his claims for refund and asserted a new one. The Government neither objected to the resulting variance nor in words waived it, but proceeded to meet the new ground with argument and evidence. Toward the end of the trial counsel for the Government and Tucker stipulated orally (see p. 26, *infra*) the amount to which Tucker would be entitled if the Court should find in his favor on the new ground urged at the trial. In view of the failure on the part of counsel for the Government to raise the

question of variance during the trial and of his entering into the stipulation, this Court held that the Government had waived the variance. However, the absence of a stipulation is not a distinguishing ground. It is sufficient grounds of waiver if the Government fails to raise properly the question of variance at the trial (*Howbert v. Penrose*, 38 F. (2) 577, 580); *Northwestern National Bank and Trust Co. v. United States*, 46 F. Supp. 381; *Hopkins v. Magruder*, 34 F. Supp. 381, 382-383, aff'd on other grounds, 122 F. (2) 693; *Beaverdale Memorial Park v. U. S.*, 47 F. Supp. 663) or if it acquiesces to an amendment giving rise to a variance (see *Snead v. Elmore*, *supra*, p. 313).

Counsel for the Government did not object to the filing of the First Amended Petition; in fact, he entered into a stipulation that it should be filed, and in doing so he raised no question of variance. Furthermore, he did not amend the Government's answer to raise a question of variance, but left it to stand as it was when under the pleadings of petitioner there could have been no grounds upon which to raise a question of variance.²⁸ Neither in his oral statement to the Court concerning the issue involved in the case, nor in the brief which he submitted to the trial Court for the Government, did he raise a question of variance.

Petitioner submits that the conduct of counsel for the Government in the instant case affords equally as clear a waiver of the variance as did the conduct of counsel for the Government in the *Alexander* case and the other cases

²⁸The Court below placed its holding that the Government did not waive the variance at the trial on the grounds that the point had been saved by the demurrer which the Government interposed to petitioner's original petition (see p. 6, *supra*). The variance, however, arose only upon the filing of the First Amended Petition (see p. 7, *supra*). Since a demurrer only raises the sufficiency of the pleading to which it is directed, it is obvious that this holding of the Court below is erroneous. Furthermore, the demurrer did not assert insufficiency, on grounds of variance, but only, in so far as here material, on the ground that the assignment of June 30, 1934 was void under R. S. § 3477, *supra*.

cited, and that the Circuit Court of Appeals committed error in holding the contrary.

III.

Respondent could waive the variance.

In *Tucker v. Alexander, supra*, this court pointed out that, at the time of the trial of that case, the statute of limitations had not run against the claims for refunds with respect to the taxes in suit, and hence the waiver of the variance did not constitute a waiver of the statute of limitations on claims for refund, but only of the statute requiring that a claim for refund be filed with the Commissioner prior to the institution of suit. It is true that in the instant case the variance concerned arose after the statute of limitations (see n. 8, p. 4, *supra*) against claims for refund had run. However, petitioner submits that the difference does not control; that if there was a waiver in the instant case, it was a waiver of the statute requiring that a claim for refund be filed, and not a waiver of the statute of limitations against refunds.

Though the statute of limitations had run on new claims for refund in respect of the taxes which petitioner sought to recover, and though petitioner's claims had been rejected, they were still susceptible of proper amendment with the consent of the Commissioner. (*Pink v. United States*, 105 F. (2) 183, 187). An amendment, under such circumstances, is proper if the facts upon which it is based would have been ascertained by the Commissioner in determining the merits of the original claim (*ibid.*). The permission to file a proper amendment after the statute of limitations has run does not involve a waiver of the statute of limitations (*United States v. Memphis Cotton Oil Company*, 288 U. S. 62). Accordingly, if a variance consists of matter which, with the Commission's permission, could have been included in an amendment to a timely claim for refund, a waiver by the Government of a claimant's failure to submit the

subject matter of the variance to the Commissioner by proper amendment would not constitute a waiver of the statute of limitations against claims for refund, but, as in the case of *Tucker v. Alexander*, a waiver of the statutory requirement that the claim sued on be first submitted to the Commissioner.

It remains to show that the rule here contended for by petitioner has application to the facts of the instant case. This, in sum, resolves itself to showing that the subject matter of the so-called variance would have been ascertained by the Commissioner if he had investigated the merits of petitioner's claim that it was entitled to recover the taxes paid by Pacific by virtue of the latter's assignment of June 30, 1934. Petitioner submits that it is plain, as we have already said, that the first disclosure of such an investigation would have been the records showing the authority of Pacific's President and Secretary to execute the assignment, and that these records would have shown the subject matter of the alleged variance: that petitioner was the sole owner of Pacific's stock and that the assignment was a distribution in kind.

CONCLUSION.

There can be no dispute of the proposition that the Government collected from Pacific a tax to which it (the Government) was not entitled, and the District Court so held. There can be no question but that the present petitioner as the sole stockholder of Pacific was at all times the beneficial owner of the right to recover the taxes. It is not disputed that the present petitioner became owner of the legal title to the right to recover by reason of a distribution in kind of the assets of Pacific, implemented by an instrument called an assignment, dated June 30, 1934. There can be no doubt but that petitioner in a proper suit is entitled to recover the taxes paid. *Novo Trading Company v. Commissioner, supra*. The sole bar to recov-

ery suggested by the Court below is the fact that in its claim for refund petitioner mentioned the instrument of transfer and in its petition to the District Court described the whole transaction. Petitioner respectfully submits that the Court below was in error in its conclusion as to the necessity for absolute identity of detail between the claim for refund and the petition to recover in a consequent suit at law. Such holding is contradictory to the established rules and to the unbroken line of judicial authority as to the purpose, function and necessary content of the prerequisite claim.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted, **Howard F. Burns**

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OCTOBER 1943.

APPENDIX.

Statutes Involved.

R. S. § 3226, as amended by Section 1103(a) of the Revenue Act of 1932, 47 Stat. 286, now 26 U. S. C. § 3772(a)(1), reads in pertinent part as follows:

§ 3772(a)(1).—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

R. S. § 3477, 31 U. S. C. § 203, reads in pertinent part as follows:

§ 203.—*Assignments of claims void.* All * * * assignments made of any claim upon the United States * * * shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such * * * assignments * * * must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer. * * *

Section 602(1) of the Revenue Act of 1932, 47 Stat. 261, 26 U. S. C. § 3400, reads as follows:

Section 602.—There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

Section 16(a) of the Agricultural Adjustment Act of 1933, 48 Stat. 40, 7 U. S. C. § 616(a), provides in pertinent part as follows:

§ 616:—(a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date. * * *

Stipulation In Tucker v. Alexander, 275 U. S. 228.

Mr. Toomey [Counsel for Government]:

I think at this time we can simplify this case a little bit by making a stipulation here. It is stipulated that the value of the stock at March first, 1913, including the real estate and the dividends which were subsequently taken out based upon the net worth of the corporation was \$356.86 per share. That is the figure used by the revenue agent. It is also agreed that if the Government is correct in reducing the March first value by the amount of this real estate and the dividends, that that valuation per share will be reduced \$153.15, leaving a net March first value per share of \$203.71. *I believe it is also agreed that at the date of liquidation the assets of the corporation valued upon the same basis, the stock was worth \$319.42 per share that if the court should hold that the Government is wrong in its method of computing the March first, 1913, value, hold we were wrong entirely, that the plaintiff is entitled to judgment for \$6,642.13, the maximum of the recovery will be only \$6,642.13. The correct means of treating the \$216.26 will be reserved for the determination of the Court.*

Mr. Garnett [Counsel for Tucker]:

It is understood that if the Government is wrong as counsel has stated to the handling of the dividends the amount refunded of taxes will be \$6,642.13.

Mr. Toomey: Yes, sir.

Mr. Garnett: With interest from date of payment at six per cent and if the Court should hold that the refund of \$216.26 which the Commissioner has announced in the letter the taxpayer is entitled to will not be included in the judgment, then that will be deducted from the total amount so refunded.

The plaintiff reserves and by this stipulation does not waive the question of whatever benefit he may have on goodwill value shown to have existed March first, 1913, and also existed at July 1920, but which the plaintiff contends is not distributable to the stockholders on liquidation. (See Record in No. 167, October Term 1927, pp. 64-65.) (Italics supplied)

IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

—
No. 158.
—

THE B. F. GOODRICH ~~RUBBER~~ COMPANY, *Petitioner,*

v.

THE UNITED STATES, *Respondent.*

—
REPLY BRIEF OF PETITIONER.
—

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✓ WILLIAM H. BEMIS,

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Of Counsel,

January 1944.

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THE B. F. GOODRICH ~~RETRACT~~ COMPANY, *Petitioner*,

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THE UNITED STATES, *Respondent*.

REPLY BRIEF OF PETITIONER.

INTRODUCTION.

The Circuit Court of Appeals decided this case upon one point only. The petition for certiorari and the brief of petitioner likewise discussed only that one point. The Government's brief now raises three additional questions not considered by the Circuit Court of Appeals. They relate (1) to the validity of the proviso contained in Section 9(a) of the Agricultural Adjustment Act, (2) to the applicability of such proviso to cotton taxed under Section 16 of said Act, and (3) to the sufficiency of petitioner's proof in support of its claim that the taxes sought to be recovered were not passed on.

Plainly, the validity of the proviso, as affected by the decision in the *Butler* case (*United States v. Butler*, 297 U. S. 1), is a question which must be considered in its relation to the facts in the instant suit. *Liverpool, New York & Philadelphia Steamship Co. v. Commissioners*, 113 U. S. 33, 39; *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324; *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 355. Furthermore, orderly discussion would

seem to require that we reach some conclusion regarding the meaning of the law before attempting to decide to what extent it may now be inoperative. Accordingly, in this brief we first reply to respondent's second contention.

I.

THE DISTRICT COURT CORRECTLY HELD THAT THE PROVISIO IN SECTION 9(a) OF THE AGRICULTURAL ADJUSTMENT ACT DOES APPLY TO PROCESSED COTTON TAXED UNDER SECTION 16 OF SAID ACT.

(Answering Respondent's Brief, 23-30.)

The Agricultural Adjustment Act, enacted May 12, 1933 (48 Stat. 31; 7 U. S. C. 1940 Ed., Section 601, *et seq.*), authorized a tax upon the first domestic processing of certain specified basic agricultural commodities, including cotton. The Act does not by its own terms directly impose any tax. It authorized the Secretary of Agriculture to make certain fact determinations and upon the basis thereof to fix the rate of tax, if any, and the date when such tax should take effect.

In Section 16 of said Act Congress provided that in the event the Secretary of Agriculture should fix a tax upon the first domestic processing of any of the specified commodities a tax equivalent in amount should automatically be imposed upon all then existing supplies of the processed commodity in question. This is a usual and customary provision which is found not only in our tariff laws, but also in the enactments of excise taxes imposed upon manufactured articles. As hereafter pointed out, it had for its purpose the prevention of unfair discrimination.

Prior to the enactment of the Agricultural Adjustment Act, at the time when the bill was pending before the United States Senate, attention was called to the fact that under the Revenue Act of 1932 there was an existing tax of two and one-fourth cents per pound upon automobile tires sold

in the domestic trade (including the cotton content thereof), and that under the bill; in the event a processing tax should be imposed upon cotton, double taxation would result in so far as the cotton might later be used in the manufacture of automobile tires (77 Cong. Rec. 1959). Presumably to avoid that consequence Congress, by Senate amendment, incorporated in Section 9(a) the following proviso:

“Provided: That upon any article upon which a manufacturers’ sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers’ sales tax is computed on the basis of weight, such manufacturers’ sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.”

On July 14, 1933, the Secretary of Agriculture announced that the first “marketing year” for cotton should begin August 1, 1933, and that the tax on the first domestic processing of cotton should be at the rate of 4.4184 cents per pound. (T. D. 4389.) Thus, by virtue of this determination and by virtue of Section 16 of the Act, on and after August 1, 1933 all processed cotton became subject to a tax of 4.4184 cents per pound, irrespective of whether the processing of such cotton had occurred before or after such date.

With respect to the foregoing the position taken by respondent is substantially as follows. The Government contends that the tax under Section 9(a) and the tax under Section 16 are two separate and distinct tax provisions; that the tax under Section 9(a) is strictly and technically a processing tax since by its terms it is imposed upon the first domestic processing; that the tax under Section 16 is a tax upon the possession of processed cotton; and that since the tax under Section 16 does not come into effect until after the processing has taken place the tax is not a

"processing tax" within the meaning of that term as used in the proviso contained in Section 9(a).

Manifestly this argument depends for its validity upon the hypothesis that the two provisions are to be regarded as separate and independent. If Congress in fact intended that the two provisions should be read together, both as part of one tax, the contention of the Government falls to the ground. Thus it becomes our first duty to consider the language of the law in its context.¹

A. Respondent's construction of the Agricultural Adjustment Act is inconsistent with its language and purpose.

Section 16(a) of the Agricultural Adjustment Act, so far as pertinent, provides:

"Upon * * * any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, * * * there shall be made a *tax adjustment* as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with

¹ Respondent argues (Br. 26) that there is a presumption that a proviso refers only to the provision to which it is attached. Here again, however, the matter is determined by the legislative intent (see *United States v. McClure*, 305 U. S. 472) and the modern rule is that no presumption arises from the mere location of the proviso that it is applicable only to the section in which it appears or to preceding sections. 2 *Sutherland Statutory Construction* (3rd Ed.), p. 472; *McDonald v. United States*, 279 U. S. 12; *Hopkins v. Hopkins*, 287 Mass. 542, 192 N. E. 145; *Keilon v. Boyne*, 239 Mich. 204, 214 N. W. 316; *Reuter v. Board*, 220 Cal. 314, 30 Pac. (2d) 417.

The proviso clause in Section 9(a) in no way limits the effect nor provides an exception to the operation of Section 9(a). It in no way reduces the tax collected under Section 9(a). In effect, this proviso clause limits the operating effect of the Manufacturers' Excise Tax in that it excludes the weight of the cotton from the weight of the tire in computing the tax. The proximity of the location of this provision to the taxing provision of Section 9(a) therefore loses any significance.

respect to the commodity from which processed if the processing had occurred on such date." (Italics supplied.)

The question raised by the above language is whether Congress intended thereby to impose a separate and distinct tax, or intended, by way of "adjustment," to extend the processing tax to all existing supplies of cotton upon the effective date of the tax irrespective of the time when the processing occurred. The expression "to adjust" means "to equalize," literally "to make just." In this connection the use of that expression would seem to show an intent to abolish the distinction, for which the Government here contends, predicated upon the wholly irrelevant circumstance as to the time of actual processing. An adjustment of the processing tax, and this is the only descriptive language or designation found in the law itself, would seem to be literally and technically a part of the tax so to be adjusted. This conclusion is compelled not only by the language of the law but also by a consideration of its legislative history.

Thus Mr. Mordecai Ezekiel, Economic Advisor of the Department of Agriculture, before the Senate Committee on Agriculture (Senate Hearings on H. R. 3835, 73d Cong., 1st Sess. (1933) 64), in response to a question by Senator Norris respecting the purpose of Section 16, explained such purpose as follows:

"This is the idea of that, Senator: If at the time the processing tax on wheat goes into effect the wheat miller and the wholesale baker should have on hand any considerable quantity of flour milled without payment of the tax, if no provision were made for a tax on that, they would try to mill ahead enough to last, say, half a year, just like they try to bring in goods before the tariff is levied, so it is customary in a revenue tax of this kind to insert a provision prohibiting them from evading the tax by processing ahead of time. A similar provision is in many of the

manufacturers' taxes already passed by Congress, and this simply says that whatever they hold at that time has to pay a corresponding tax, even though it is a processing tax.

• • •

Senator Norris. They just take the stock they have on hand and make them pay the same tax as though they had purchased it after the tax went into effect.

Mr. Ezekiel. That is the point; yes."

Thus in H. R. Rep. No. 6, 73d Congress, 1st Sess. (1933) 5, the purpose underlying the forerunner of what subsequently became Section 16(a) is stated in the following terms:

"In order to make effective the operation of the tax provisions and to *prevent unfair discriminations* resulting therefrom, certain supplemental revenue provisions are included in the bill. These are as follows:

• • •

(c) There is levied upon floor stocks, when the processing tax first goes into effect with respect to any commodity, a tax equal to the processing tax which would have been payable with respect to the commodity from which the floor stocks are processed if their processing had occurred when the processing tax was in effect. A corresponding refund is provided on floor stocks when the processing tax finally terminates.

• • •

*The above supplemental revenue provisions serve * * * to prevent unfair competition within any industry."*¹ (Italics supplied.)

¹ This purpose was later confirmed in H. R. Rep. No. 2475, 74th Cong., 2d Sess. (1936), wherein it was stated (p. 15):

"The Agricultural Adjustment Act provided for a floor-stocks tax on the effective date of the processing tax *in order that all articles, the product of a commodity subject to the processing tax, should move into the channels of trade equally taxed.*" (Italics supplied.)

B. Respondent's construction of the Act renders it discriminatory, unenforceable and absurd.

It is elementary that in construing the meaning of any law the courts are not required to interpret the language thereof in a vacuum. Furthermore, since the intent of Congress is the law, the Court is entitled to place itself in the position of Congress by examining the facts upon which the law was designed to operate, to the end that the law may be given a construction which effectuates rather than defeats the intention of Congress; and as a corollary to that, to the end that the law may not be given a meaning and interpretation which is merely absurd. *American Tobacco Company v. Werckmeister*, 207 U. S. 284, 293; *Ozawa v. United States*, 260 U. S. 178, 194; *Barrett v. Van Pelt*, 268 U. S. 85, 90; *Fleischmann Co. v. United States*, 270 U. S. 349, 360; *Helvering v. New York Trust Company*, 292 U. S. 455, 464-465; *Darby-Lynde Co. v. Alexander* (C. C. A. 10), 51 F. (2d) 56, 58; *Grier v. Kennan* (C. C. A. 8), 64 F. (2d) 605, 606-7.

Since the Government takes the position that the tax under Section 9(a) and the tax under Section 16 are two separate and distinct tax provisions, the Government is compelled to defend the position that Congress intended to create two separate and distinct classifications of cotton for tax purposes. According to this contention, in the first classification there is embraced all cotton processed on and after August 1, 1933, the effective date of the Act, and such cotton was subject to only one tax, namely, the tax of 4.4184 cents per pound. In the second classification is embraced all cotton processed prior to August 1, 1933. According to the Government's contention it was the intent of Congress that all such cotton should be subject to two taxes, namely, a tax of 4.4184 cents per pound under the Agricultural Adjustment Act and in addition, in so far as such cotton might subsequently be used in the manufacture of automobile tires, the further tax under the Manu-

facturers' Excise Tax law of two and one-fourth cents per pound. Obviously this interpretation of the law renders the Act discriminatory and absurd. It imputes to Congress an intent, at a date in the future to be fixed by the Secretary of Agriculture, to diminish the value of then existing supplies of cotton by imposing thereon a tax burden not imposed upon cotton subsequently processed.

It is no answer to this to say, as respondent does (Resp.'s Br. 29), that the double taxation is corrected or that the discrimination is removed when the processing tax is wholly terminated, by the provision in Section 16(a)(2) authorizing the refunding of the processing tax on all supplies of processed cotton held on that date. While this provision does have the effect of placing all taxpayers and all supplies of the processed commodity on a basis of equality (which was the manifest purpose of Section 16(a)(1) as well as of Section 16(a)(2)), it does not go beyond this and does not provide a windfall to the tire manufacturer as implied in respondent's brief. By no stretch of the imagination does it restore to the tire manufacturer any part of the double tax imposed under respondent's theory at the outset of the tax period.¹ If it

¹ This appears from the following considerations.

(1) The proviso does not apply in favor of cotton in respect of which the tire manufacturer is entitled to a refund of the processing tax at the end of the tax period. This is conceded by respondent. (Respondent's Br. 29.)

(2) It may not be assumed that the refund to the tire manufacturer of the amount of the processing tax on floor stocks held at the termination of the processing tax would constitute a windfall. With respect to such floor stocks the presumption is that the price paid therefor included the processing tax and this was the very theory of the processing tax law.

(3) It is plain that under the Government's construction, at the outset of the tax period, cotton used in the manufacture of automobile tires was subject to two taxes (the tax under Section 16

(Continued on next page)

can be supposed that Congress foresaw the double taxation of cotton taxed under Section 16, resulting from respondent's interpretation, it may also be supposed that Congress would have found some direct and appropriate means of avoiding it. Plainly the refund provided in Section 16 to be paid to the holder of the cotton when the tax is terminated was made upon the theory that such holder either paid the processing tax or absorbed it in the price paid for its purchase, and was not made as an indiscriminate reward to offset a recognized inequality.

The absurdity resulting from respondent's interpretation of the law does not stop at this point. If Congress had intended to create two separate classifications of cotton for tax purposes it is to be presumed that Congress would have implemented such intent by providing for the identification of the cotton taxed under Section 16. The Agricultural Adjustment Act does not provide for the labeling of cotton processed prior to the date to be fixed by the Secretary of Agriculture. The regulations issued by the United States Treasury Department do not require nor provide for the marking or identification of cotton processed prior to August 1, 1933. A manufacturer receiving a supply of processed cotton subsequent to August 1, 1933 had no means of knowing whether such cotton had been taxed under Section 9(a) or under Section 16 of the Act.

Thus, as construed by the Government, the double taxation of cotton processed prior to August 1, 1933 falls only upon the tire manufacturer and only upon the stocks actually in his hands on that date. Cotton processed prior to

(Continued from preceding page)

of the AAA and the Manufacturers' Excise Tax). It follows from (1) above that at the end of the processing tax period the Manufacturers' Excise Tax was restored on the full weight of the tire. Hence at all times cotton used in the manufacture of tires was subject to at least one tax. Therefore, under the Government's interpretation, the double taxation of the cotton taxed under § 16 (a) (1) remains and is in no way offset.

August 1, 1933 would have one value in the hands of a rubber tire manufacturer and another and higher value in the hands of the processor from whom the tire manufacturer purchases his supply. So construed the Act not only discriminates against the tire manufacturers but also contradicts the intention expressed in Section 16(a)(2) making the law applicable to all supplies of cotton and to all holders thereof other than holders for retail sale.

To be sustained as a tax measure the construction of the provisions here involved must have some proper relation to the production of revenue. The Manufacturers' Excise Tax law does not apply to all products manufactured from rubber and processed cotton. It applies only to tires and automobile accessories. It does not apply to all tires. It does not apply to tires sold to governments or for export. Thus if Congress intended that cotton taxed under Section 9(a) should not be subject to the Manufacturers' Excise Tax and that cotton taxed under Section 16 should be subject thereto, and if this intention had been made reasonably plain, either by the provisions of the Act itself or by the regulations issued thereunder, no additional revenue could possibly have resulted through double taxation under the law as so construed. The rubber tire manufacturer, who as we have seen is alone affected, would merely devote supplies of processed cotton on hand August 1, 1933 to the manufacture of articles not subject to Manufacturers' Excise Tax. In so far as any such cotton entered the manufacture of tires, such tires would be set aside for sale to governments or for export. Since no provision is made in the Act for identification by processors of cotton taxed under Section 16, the tire manufacturer was free to use any cotton delivered to him after August 1, 1933 without becoming subject to the Manufacturers' Excise Tax thereon. Thus

the Government's construction fails of any purpose to produce revenue, except by entrapment of the taxpayer.¹

As the foregoing considerations show, under the Government's interpretation of Sections 9(a) and 16, the law becomes absurd. To say that such interpretation is nevertheless compelled by the language of the Act is equally absurd. There is nothing in the Act to show an intention to create two classifications of processed cotton for tax purposes. There are no provisions in the Act for the identification of cotton processed prior to August 1, 1933, essential to the enforcement of the tax and to avoid discrimination. There is nothing in the debates before Congress or in the legislative history to show that Congress intended to single out stocks in the hands of tire manufacturers as the only stocks to be subject to double taxation. There is nothing in the record to support a construction of the law which, if understood, could only restrict the use of relatively limited stocks of processed cotton in the hands of the tire manufacturer, without any revenue producing effect. Upon this issue, plainly the decision of the District Court was correct.

¹ The Treasury Department in its bulletin, "Regulations 81," issued under date of July 12, 1933, to advise taxpayers respecting their rights and obligations under the Agricultural Adjustment Act, in its discussion of Section 16, is wholly silent with respect to whether taxes imposed thereunder are "processing taxes" within the meaning of subsection 9(a), whereas under Section 15(c), relating to "compensating tax," the statement appears: "The compensating tax is not a processing tax but is a tax on imported articles."

II.

THE DISTRICT COURT CORRECTLY HELD THAT THE PROVISIO IN SECTION 9(a) OF THE AGRICULTURAL ADJUSTMENT ACT WAS NOT RENDERED INOPERATIVE, AB INITIO, BY VIRTUE OF THE DECISION IN UNITED STATES v. BUTLER.

(Answering Respondent's Br. 13-23.)

Having considered the meaning of the law we turn to the question of the effect thereon of this Court's decision in the *Butler* case. The question presented is whether the invalidity of the tax under the Agricultural Adjustment Act invalidates the proviso contained in Section 9(a) thereof, and more particularly whether such proviso becomes inoperative *ab initio*. Since this suit involves a sales tax on tires sold by the taxpayer long prior to the decision in the *Butler* case, the Government must necessarily contend, not merely that the proviso has ceased to confer any rights with respect to tires manufactured and sold subsequent to the termination of the processing tax, but that no valid rights were ever conferred by the proviso. Obviously the inducement for the proviso was the payment of the processing tax and hence the precise issue is whether Congress would have wished that invalidity of the tax, which was the inducement for the proviso, should invalidate, *ab initio*, the proviso itself. *Dorchy v. Kansas*, 264 U. S. 286; *Williams v. Standard Oil Co.*, 278 U. S. 235.

Section 14 of the Agricultural Adjustment Act reads as follows:

"SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby."

The foregoing section gives rise to a presumption of separability. *Carter v. Carter Coal Co.*, 298 U. S. 238; *Electric*

Bond & Share Co. v. Securities & Exchange Commission, 303 U. S. 419. It throws upon the Government the burden of showing that Congress did not intend to grant any vested rights under the proviso and that the clear inference to be drawn from the law is that Congress intended that exemption from the second tax (the excise tax) should depend upon the validity of the first.

Accepting this burden, respondent nevertheless argues "that Congress would not have wanted the valid manufacturers' sales tax to be reduced on account of the payment of an unconstitutional processing tax"; that the sole purpose of the proviso was to prevent double taxation, and that in so far as the unconstitutional processing tax might be recovered by the taxpayer, the proviso not only loses its purpose but has the effect of exempting the cotton "even from single taxation." (Resp. Br. 20.)

A. The argument that invalidity of the proviso, ab initio, must be presumed to avoid tax exemption, does not apply.

In making its argument that Congress must have intended that the proviso should fall with the tax, respondent overlooks the element of time. The processing tax, excepting Section 16, being a tax on the "first domestic processing," is a tax paid by the processor. It is not paid by the automobile tire manufacturer except as it may have been included in the price of the cotton. Between August 1, 1933, the effective date of the processing tax, and January 6, 1936, the date of the decision in the *Butler* case, all tires sold in the United States to the domestic trade were sold in reliance upon the statement expressly written into the law that the weight of the cotton content thereof was not subject to the Manufacturers Excise Tax. Thus respondent is seen to argue that because one taxpayer, the processor, may become entitled to the repayment of an un-

constitutional tax, it follows that Congress would have wished, by way of an *ex post facto* exaction and contrary to the express provision of a presumably valid statute, to recoup from another and different taxpayer, the automobile tire manufacturer, and under a different tax law, the revenue lost by reason of the unconstitutionality of the first tax.

It is not to be presumed that Congress would have wished that the correction of an error in the law, resulting from the *Butler* decision, should thus lead to the imposition of a penalty, probably itself unconstitutional and certainly unjust, against a group of taxpayers who have no benefit from, nor interest in, the rights which are said to arise in favor of another group resulting from such correction. The Government will not claim that it has ever asserted its present theory of the law by seeking to collect the Manufacturers Excise Tax upon the weight of the cotton content of tires manufactured and sold between August 1, 1933 and January 6, 1936, containing cotton taxed under Section 9(a) of the Agricultural Adjustment Act, and in the face of its own administrative interpretation over this period of some seven and one-half years its present insistence of invalidity *ab initio* against this single taxpayer is patently indefensible.

B. The failure of Congress, under the 1936 Act, to charge taxpayers, claiming refunds of the processing tax, with sums saved under the Manufacturers Excise Tax law, is without significance.

Processed cotton is used in a vast variety of manufactured articles. A relatively insignificant portion is used in the manufacture of automobile tires. The processor seeking a refund of taxes under the Agricultural Adjustment Act could not know what part, if any, of the cotton in

question subsequently went into tires and was deducted in computing the Manufacturers Excise Tax. Furthermore, even if this could be established, here again no reason appears for charging the processor for a deduction which some other taxpayer has taken in computing another tax. The only instance in which the same taxpayer would be called upon to pay both taxes would be, as here, where the tire manufacturer was called upon to pay the processing tax on floor stocks under Section 16 of the Agricultural Adjustment Act.

In the instant case the taxpayer has not received any refund for taxes paid under Section 16 (R. 86). Any right to any such refund has long since been barred by statute. Revenue Act of 1936, Section 903, 49 Stat. 1747, 7 U. S. C. 645. Hence the question of whether the petitioner could equitably recover the tax under Section 16 without accounting for any savings which it had made as a result of the operation of the proviso, is purely academic. However, if it should be considered that equitably the same taxpayer should not recover both taxes, irrespective of whether any tax had been passed on, there is no need of invoking the theory that the proviso was inoperative *ab initio*. Where privity exists, any claim for the refund of one tax is subject to the Government's right of equitable set-off, and such right is independent of any express statutory provision. *Stone v. White*, 301 U. S. 532, 534-535; *Hettinger v. Schine Chain Theatres, Inc.* (C. C. A. 2d), 121 F. (2d) 948, 950; cf. *Lewis v. Reynolds*, 284 U. S. 281, 283. Since this is the well-established law, if any inference is to be drawn from the fact that Congress did not specifically provide for a set-off in the exceptional case where both taxes applied to the same taxpayer, it is that Congress considered that neither tax should be retained where the evidence showed that neither tax had been passed on.

- C. The fact that on June 3, 1937 Congress re-enacted most of the provisions of the Agricultural Adjustment Act, omitting Sections 9 and 16, is equally without significance.**

The re-enactment of the Agricultural Adjustment Act was seventeen months after the decision in the *Butler* case. By that date the proviso was *functus officio*. Tire manufacturers do not purchase supplies of processed cotton for seventeen months in advance, and by June of 1937 it may safely be assumed that all cotton taxed under either Section 9(a) or 16 had long since been converted and sold.

- D. Irrespective of whether the proviso is deemed still to be operative, petitioner's rights should not be affected by the decision in the *Butler* case.**

If the proviso in Section 9(a) applies to cotton taxed under Section 16, which for the purpose of the present argument must be conceded, it necessarily follows that the second tax (the excise tax) was not validly imposed under the law existing at the time when such second tax was collected. The decision of this Court in the *Butler* case does not mention the proviso. The proviso imposes no tax. It operates in conjunction with and in relation to the Manufacturers Excise Tax. Hence, if the proviso is no longer operative that is not because there is anything unconstitutional about the proviso itself, and the Government does not so contend.

The petitioner having paid due regard to the tax requirements of the Agricultural Adjustment Act before their constitutionality had been adjudicated, it now has a status which is not affected by the unconstitutionality of the tax provisions of such law. *Chicot County Drainage District v. Baxter State Bank, et al.*, 308 U. S. 371, 374; *Davis' Estate v. Commissioner of Internal Revenue* (C. C. A. 6th), 126 F. (2d) 294, 295, cert. den. 317 U. S. 640; *J. A.*

Dougherty's Sons, Inc. v. Commissioner (C. C. A. 3d), 121 F. (2d) 700. As stated in *J. A. Dougherty's Sons v. Commissioner, supra* (702-3):

"Nowhere is the propriety of recognizing and accrediting a status produced by a statute before its unconstitutionality has been judicially declared more strongly indicated than it is in the case of tax statutes. The subject taxpayer is under compulsion to pay due regard to the requirements of the statute until its invalidity has been authoritatively adjudicated. The Board of Tax Appeals has so recognized in a number of cases where deductions have been allowed for taxes paid under statutes which were later held to be invalid. * * * All of the events imposing the tax occurred in each of the several years for which deduction is claimed."

In recognition of this rule, after holding as a matter of construction that the proviso was not invalid *ab initio*, the District Court concluded (R. 101):

"We also incline very strongly to the conclusion that, apart from the right of the taxpayer to a refund of the wrongfully demanded and collected excess taxes under the applicable revenue laws, the record before us entitles the taxpayer to the refund under the equitable remedy of money had and received. See *Bull, Executor v. United States*, 295 U. S. 247; *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, at page 350."

III.

BOTH THE RECORD IN THE DISTRICT COURT AND THE FINDINGS OF THE DISTRICT COURT SHOW THAT THE TAXES HEREIN SOUGHT TO BE RECOVERED WERE NOT PASSED ON.

(Answering Respondent's Br. 30-33.)

The section of the law with which we are here concerned is Section 621 (d) of the Revenue Act of 1932 (47 Stat. 267) which, so far as pertinent, provides:

"No overpayment of tax under this title shall be credited or refunded * * * in pursuance of a court

decision or otherwise, unless the person who paid the tax establishes * * * that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee * * *."

Consistently with the foregoing section, petitioner appropriately alleged in its bill of complaint that the tax sought to be recovered had not been passed on (R. 76), which allegation, upon information and belief, the respondent by answer denied (R. 45). Upon the trial of this issue the evidence showed (R. 90-92) and the Court found (Finding XXII, R. 151-152):

"That throughout the period from August 1, 1933, to April 10, 1934, the Pacific Goodrich Rubber Company was informed and believed that, for the purpose of computing the manufacturer's excise tax on tires manufactured and sold by it; it was entitled under the provisions of Sec. 9(a) of the Agricultural Adjustment Act to deduct from the weight of the tires so sold the weight of the processed cotton contained therein upon which a tax had been paid either under Sec. 9(a) or Sec. 16 of the Agricultural Adjustment Act; that Pacific Goodrich Rubber Company and plaintiff at all times prior to said April 10, 1934, believed that the tax burden with respect to such tires would amount to \$0.044184 on the processed cotton contained in said tires and 2¼ cents per pound on the remaining weight of said tires; that at no time during the period preceding April 10, 1934, did Pacific Goodrich Rubber Company or plaintiff contemplate that Pacific Goodrich Rubber Company or plaintiff would be compelled to pay an additional manufacturer's excise tax of 2¼ cents per pound on the weight of the processed cotton contained in said tires and on which had been paid a floor stocks tax under Sec. 16 of the Agricultural Adjustment Act. That all tires containing processed cotton which was held for sale or other disposition by the Pacific Goodrich Rubber Company on August 1, 1933 were sold and billed to the purchasers or vendees of the Pacific Goodrich Rubber Company long before

demand was first made upon said company that it pay an additional manufacturer's excise tax of 2 1/4 cents per pound on the weight of the processed cotton contained in said tires, and that after said additional tax had been demanded and paid no additional billing was made to said purchasers or vendees and no additional amount collected from them."

It was further shown by stipulation (R. 91):

"that the prices at which Pacific Goodrich Rubber Company sold said tires during said period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which during said period it sold tires containing processed cotton on which a tax was payable under Section 9-a of the Agricultural Adjustment Act."

Contrary to the impression which is suggested by respondent's brief (p. 30, p. 32), the District Court did not make any finding to the effect that the tax sought to be recovered was included in the price of the tires or had otherwise been collected. On this issue it did conclude, however (Conclusions of Law VII, R. 156):

"That plaintiff failed to establish that the tax, the refund of which is sought by this action, was not passed on to the vendees or purchasers of the Pacific Goodrich Rubber Company within the requirements of Section 621 (d) of the Revenue Act of 1932."

That in so concluding the District Court erred, may be briefly pointed out.

A. Where, as here, it is established that a sales tax was not assessed against or contemplated by the taxpayer until long after the article with respect to which the tax was assessed had been sold, the taxpayer makes a *prima facie* case that such tax was not included in the price of the article sold.

The precise question is whether a taxpayer who has fixed the selling price of tires containing cotton taxed under Section 16 of the Agricultural Adjustment Act, under the belief that said cotton content was exempt from further tax and was not subject to the Manufacturers' Sales Tax (the price fixed being no greater than the price fixed for similar tires containing cotton admittedly exempt from such further tax), must present additional proof in order to show, *prima facie*, that the contemplated and unassessed sales tax was not added as a part of the selling price of such tires. Where that question has been presented the courts have uniformly held that the unanticipated tax was not added, and in the very nature of things could not have been added, as a part of the selling price. *Campand Corporation v. Harrison* (C. C. A. 7th), 114 Fed. (2d) 400, 407-408; *Skinner v. United States* (D. C. Ohio), 8 Fed. Supp. 999, 1004-1005; *Con-Rod Exchange, Inc. v. Hendrickson* (D. C. Wash.), 28 Fed. Supp. 924, 927; *Einson-Freeman Co., Inc. v. Corwin, Collector* (D. C. N. Y.), 29 Fed. Supp. 98, rev'd on other grounds 112 F. (2d) 683; *University Distributing Co. v. United States* (D. C. Mass.), 22 Fed. Supp. 794, 799.

Bearing in mind that the Government offered no evidence whatever on this subject, that it stipulated that if called it would be the sworn testimony of the officer of the taxpayer in charge of its accounting records that the tax in question was not in fact included in the selling price of the tires (R. 83-92), that no request was made in open court or otherwise for the production of the taxpayer's books, and that the competency of petitioner's proof was

not challenged, and under the stipulation could not be challenged (R. 80, 189, 257-258), the conclusion of the trial court that petitioner had not established a *prima facie* case upon this issue is plainly contrary to authority and in direct contradiction of the evidence and of the Court's findings.

B. Under the stipulation of this case the failure to produce the records and books of the taxpayer is without significance.

In its brief (32-33) respondent cites a number of cases for refund of taxes paid under the Agricultural Adjustment Act. The cases cited involve claims brought under Section 902 of the Revenue Act of 1936 (49 Stat. 1747), which imposes more difficult conditions upon the taxpayer than does Section 621 (d) of the Revenue Act of 1932, *supra*. In none of the cases cited did it appear that at the time the price of the article was fixed, and at the time it was sold, the taxpayer did not have in contemplation the tax sought to be refunded. So far as appears, these cases are cited merely in support of the rule that upon questions of fact the decision of the trial court is final; but as we have already seen, the District Court in this case made no finding that the tax had been passed on. Its decision was that petitioner had failed to sustain the burden of proof upon that issue, this being coupled with the statement in the opinion (R. 108) that

"No books of account or sales records were produced and no explanation for their non-introduction was made at the hearing, although the Government objected to the sufficiency of the proof that was offered on this crucial factual issue."

The question thus seemingly raised by the District Court does not involve a question of sufficiency of proof, but of competency. If, as the District Court held, the taxpayer was not obligated under the law to pay the Manufacturers'

Excise Tax upon cotton taxed under Section 16 of the Agricultural Adjustment Act, and if, as the Court *found*, the taxpayer so understood its obligation at the time the tires in question were sold, no valid inference arises that any books or records of the taxpayer would disclose facts contrary to the primary evidence of the testimony of the officer of the taxpayer in a position to know to the effect that the tax to his knowledge was not included in the selling price of the tires. If the Government thought otherwise it should not have waived objections to competency by stipulation (R. 189, 257-258). If the Court thought otherwise, irrespective of such waiver, it should have excluded the stipulated testimony on the ground that the books and records were the best evidence, or failing in this, should have granted petitioner's motion to re-open the case to permit the introduction thereof. Such motion and supporting affidavits (R. 110-135) completely rebut any inference that the records were withheld for any purpose inconsistent with truth or justice, and as already shown, the findings actually made were sufficient to support a judgment in favor of petitioner.

CONCLUSION.

The issue discussed in Section IV of respondent's brief has been fully presented in our opening brief and therefore it is not discussed further in this brief. In Points I, II and III respondent has raised issues not decided by the Court of Appeals although presented to that Court as well as to the District Court. Petitioner submits that on none of the four Points presented in respondent's brief is respondent entitled to prevail, and that for all of the reasons hereinbefore presented the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

HOWARD F. BURNS,

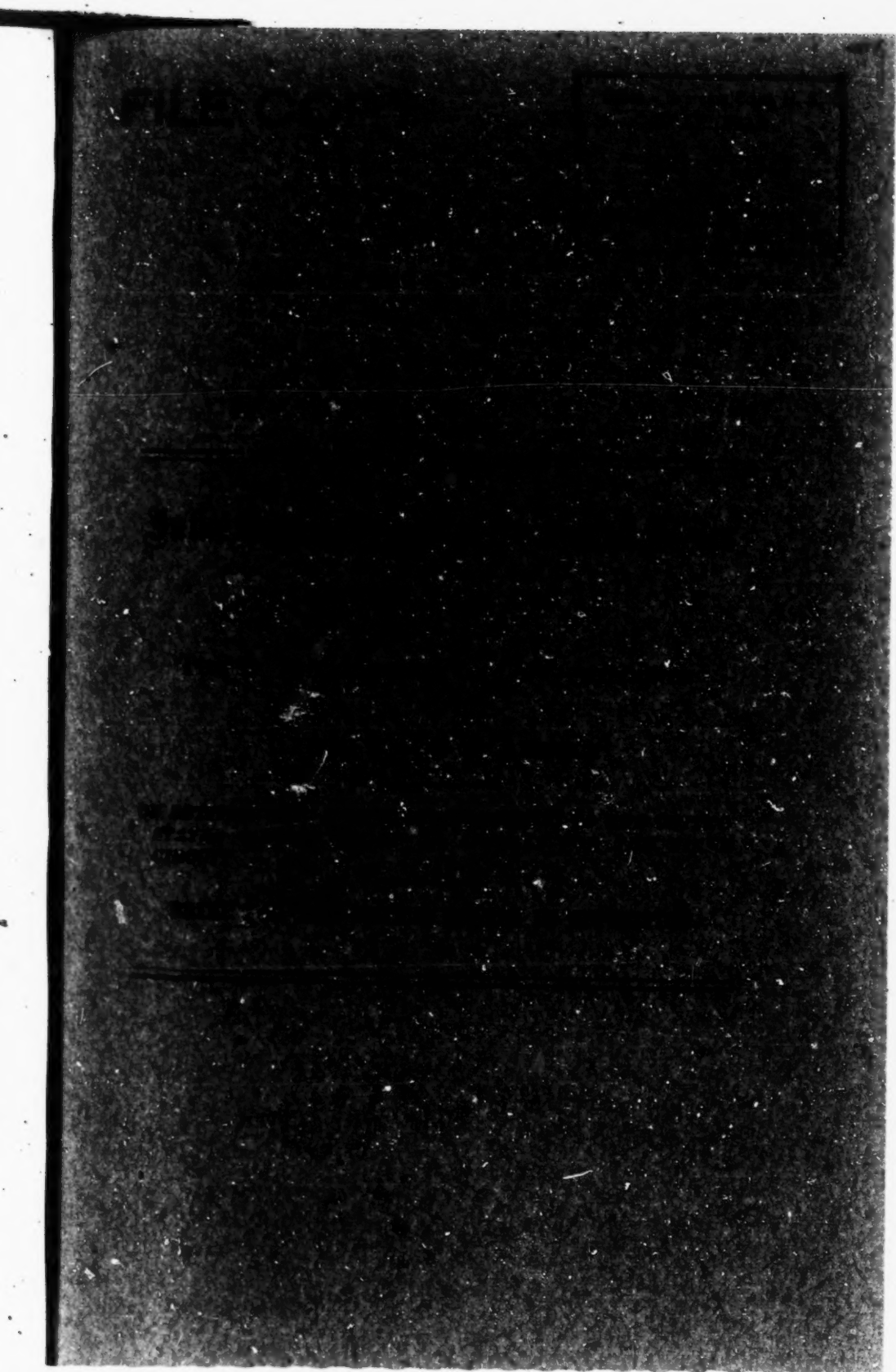
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Of Counsel.

January 1944.



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 158

THE B. F. GOODRICH COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 95-108) is reported at 48 F. Supp. 453. The opinion of the Circuit Court of Appeals (R. 285-301) is reported at 135 F. (2d) 456.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 13, 1943 (R. 302). Petition for a writ of certiorari was filed July 13, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED¹

1. Whether the variance between the cause of action for refund of taxes which the petitioner now asserts and the grounds set up in its claims

¹ Several other questions are presented upon this record and were briefed and argued by both parties in both courts below. The Circuit Court of Appeals passed upon only the one question raised by the petition for a writ of certiorari. By this brief in opposition we abandon none of our additional defenses, any one of which, if sustained, is a complete bar to this action. They are as follows:

A. Petitioner has misconceived the cause of action which the taxpayer, Pacific Goodrich Rubber Company, had. Pacific paid valid and constitutional manufacturers' excise taxes under Section 602 (1) of the Revenue Act of 1932, and unconstitutional and invalid taxes on floor stocks under Section 16 of the Agricultural Adjustment Act. Pacific's only possible cause of action was for the invalid and unconstitutional floor stocks taxes it had paid.

B. The tax which Section 16 of the Agricultural Adjustment Act imposed on "Floor Stocks" is a different tax from the "Processing Tax" imposed by Section 9 (a) of that Act, and the only credit against manufacturers' excise tax authorized by the proviso clause of Section 9 (a) is a credit based on the weight of the cotton contained in goods subject to manufacturers' excise tax on which a "Processing Tax" has been paid.

C. The credit proviso of Section 9 (a) of the Agricultural Adjustment Act is invalid, because not severable from the remainder of Section 9 (a) which was held invalid in *United States v. Butler*, 297 U. S. 1.

D. Petitioner did not satisfy the requirements of Section 621 (d) of the Revenue Act of 1932 in several particulars and especially did not prove that it was "the person who paid the [manufacturers' excise] tax," or that Pacific who did pay it, had "not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee," and the District Court properly so held (R. 156).

for refund and its pleadings is fatal; and if so, whether the variance was waived.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 15-21.

STATEMENT

The taxes paid and the claims for refund.—From August 1, 1933, to January 5, 1934, Pacific Goodrich Rubber Company, a wholly owned subsidiary of petitioner (R. 142) manufactured and sold tires containing 705,806 pounds of processed cotton on which it paid to the Collector of Internal Revenue the floor-stocks tax provided for by Section 16 (a) of the Agricultural Adjustment Act (Appendix, *infra*) (R. 144-146). In computing the manufacturers' excise tax imposed upon these tires by Section 602 (1) of the Revenue Act of 1932 (Appendix, *infra*), Pacific Goodrich Rubber Company (herein referred to as "Pacific")—in reliance upon the proviso clause of Section 9 (a) of the Agricultural Adjustment Act (Appendix, *infra*)—deducted from the gross weight of such tires the 705,806 pounds of processed cotton on which it had paid the floor-stocks tax (R. 145).

The Commissioner of Internal Revenue disallowed Pacific's deduction of the weight of the processed cotton from the gross weight of the tires in computing the excise tax, and demanded, as an additional excise tax, the sum of \$15,880.64, which

was arrived at by applying the rate of the excise tax to the weight of processed cotton which Pacific had deducted in its computation of the tax (R. 146). Pacific paid the additional manufacturers' excise tax so demanded, together with assessed interest of \$569.75 thereon, on April 18, 1934, and July 27, 1934, respectively (R. 146; 197). No part of the additional tax or interest has been refunded either to Pacific or to petitioner (R. 150).²

On June 30, 1934, Pacific, by its president and its secretary, executed an assignment by which it assigned "to The B. F. Goodrich Company * * * all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have * * *," and at the close of business at that date Pacific delivered all its assets in kind to the petitioner (R. 148; Ex. A, R. 191-193, 228, 230). The assignment was ratified by Pacific's board of directors and stockholders on July 6, 1934, "as a distribution in kind" of all the assets of the corporation to its sole stockholder, the B. F. Goodrich Company (R. 147, 228, 230). At the same time the stockholders directed the officers of the corporation to convey to petitioner all of Pacific's real estate and to take the measures necessary to

² The record seems to establish, however, that a refund of \$62.52 of the interest was actually allowed April 12, 1935 (R. 202).

dissolve the corporation (R. 230-231). Pursuant to the latter direction Pacific was dissolved on December 21, 1934 (R. 141, 233-235).

Likewise, on August 14, 1935, the officers of Pacific executed on behalf of the corporation an assignment of that date (Ex. B, R. 194-195), under the terms of which Pacific did "sell, assign, and transfer" to petitioner "all claims, demands, choses in action or cause or causes of action of whatsoever kind," including "particularly its claim for refund of excise tax illegally paid to the United States * * * in the sum of \$16,450.39, * * *."

Pacific and the petitioner each filed, on August 31, 1935, a claim for refund of the additional manufacturers' excise taxes and interest which Pacific had thus paid (Ex. D, R. 199-202; Ex. F, R. 209-214). Both of these claims were predicated upon the ground that Pacific, in computing the excise tax on the tires which it sold, was entitled under the proviso of Section 9 (a) of the Agricultural Adjustment Act, to deduct from the gross weight of the tires the weight of the processed cotton contained therein on which Pacific had paid a floor stocks tax under Section 16 (a) of the Act. In addition, petitioner stated in its claim for refund (Ex. F) that it was entitled to the refund by virtue of the assignment made to it by Pacific on June 30, 1934 (R. 148-149, 211-213).

Pacific and the petitioner each filed an amended claim for refund April 21, 1936, which differed from the original claims only in the statement that Pacific had not included the taxes in the prices of the tires on which the tax was assessed (R. 149; Ex. E, R. 204-208; Ex. G, R. 215-220). In both their original and amended claims petitioner and Pacific gave their addresses as 5400 East Ninth Street, Los Angeles, California (R. 199, 204, 209, 215), and petitioner's original claim and both of Pacific's were submitted by S. M. Jett as secretary of the respective corporations (R. 201, 207, 213).

The Commissioner of Internal Revenue on April 8, 1936, rejected Pacific's original claim for refund (R. 150) and on May 22, 1936, its amended claim for refund (R. 223-224). A ground common to both letters of rejection was that Section 9 (a) of the Agricultural Adjustment Act did not authorize a deduction of the weight of the cotton contents of tires on which a floor stocks tax had been paid under Section 16 (a) of that Act, in computing the excise tax imposed on tires by Section 602 (a) of the Revenue Act of 1932. A further reason given for the rejection of Pacific's amended claim was that such claim failed to set forth any new and material evidence. (R. 223-224.)

On the same day, May 22, 1936, the Commissioner, by letter sent to petitioner, rejected petitioner's original and amended claims (R. 119-

150). The material part of this letter (R. 221-222) reads as follows (R. 222):

It is stated [in petitioner's claims] that you are entitled to the refund * * * since the Pacific Goodrich Rubber Company sold, assigned, transferred and set over to you all its rights and claims. It is contended that the Pacific Goodrich Rubber Company erroneously paid manufacturers' excise tax in the amount claimed for the reason that floor tax was paid on the cotton content of the tires in question.

There is on file in this office a claim filed by the Pacific Goodrich Rubber Company for refund of the above tax, based on the same contentions. This claim is therefore a duplicate claim and is rejected in full.

The pleadings and trial.—On October 1, 1937, petitioner filed in the District Court its original petition (R. 2-25) for recovery of the additional manufacturers' excise tax collected from Pacific in 1934. That petition asserted title to Pacific's choses in action by virtue of the assignment of June 30, 1934, set forth in the petition. The petition next stated that the tax sued for was collected "from the Plaintiff" (R. 6). The remainder of the petition contained allegations of facts designed to show that the tax had been erroneously collected from Pacific, and that judgment for recovery of the tax should accordingly be entered for the plaintiff (R. 6-25).

Respondent on December 3, 1937, met the petition with a demurrer which, on the assumption that the petition sought recovery of taxes paid under the Agricultural Adjustment Act, challenged the jurisdiction of the District Court under Sections 905 and 906 of the Revenue Act of 1936, and the sufficiency of the petition generally and under Sections 902, 903, 904, and 906 of the same Act (R. 28-31). On April 6, 1938, the Government amended its demurrer by adding another ground which challenged, under Section 3477, Revised Statutes (Appendix, *infra*), the validity of Pacific's assignment of June 30, 1934 (R. 33-34). The B. F. Goodrich Company then amended its petition by setting forth Pacific's assignment of August 14, 1935, as "in addition to" and "a supplement" of Pacific's assignment of June 30, 1934, set forth in the original petition (R. 35-37). Respondent on August 1, 1938, demurred to the petition as amended on the same grounds set forth in its original demurrer as amended (R. 39). The District Court on October 3, 1938, overruled the demurrer (R. 41).

The respondent filed its answer on February 3, 1939 (R. 41-48). The answer did not assert that there was a variance between the claim for refund and the petition as amended; it did allege, among other things, that the provision of the Agricultural Adjustment Act for a deduction from the weight of articles subject to manufacturers' excise

tax under the Revenue Act of 1932, was invalid "for the reason that said Agricultural Adjustment Act as to the payment or collection of alleged taxes thereunder has been held to be unconstitutional and null and void and of no effect" (R. 48).

Thereafter, on February 5, 1940, petitioner filed its first amended petition (R. 50-78) which differed little from the original petition save to allege (R. 51) that petitioner as the sole stockholder of Pacific "became by operation of law, pursuant to a distribution in kind to it by Pacific * * *," on June 30, 1934, the sole owner of "all the rights, claims, and choses in action" which Pacific then had. Pacific's assignments of June 30, 1934, and August 14, 1935, were set out at length "as physical evidence, affirmative proof and in confirmation of" this allegation (R. 51). Three days before the filing of this first amended petition the parties stipulated that the original petition as amended might be "amended in the particulars as set forth in plaintiff's First Amended Petition," and that respondent's previous answer as amended should be deemed an answer to petitioner's first amended petition (R. 78-79). The case was then tried February 10, 1940 (R. 93).

The decision of the District Court.—The District Court held (1) that the literal language of the proviso clause of Section 9 (a) of the Agricultural Adjustment Act should be disregarded in favor of a construction permitting taxpayers to

compute any manufacturers' excise tax imposed on them by Section 602 of the Revenue Act of 1932, by deducting from the gross weight of the tires sold the weight of the processed cotton therein on which they had paid either a processing tax under Section 9 (a) or a floor-stocks tax under Section 16 of the Agricultural Adjustment Act (R. 98-100, 153); (2) that the proviso clause of Section 9 (a) of the Agricultural Adjustment Act was valid despite the unconstitutionality of all other provisions of Section 9 (a) and Section 16 (R. 100, 154-155). The District Court then held (R. 102-108, 155-156), however, that petitioner was not entitled to recover the manufacturers' excise tax which Pacific had paid, because: (a) petitioner's right, if any, to refund vested in it by reason of the two written assignments which Pacific executed in petitioner's favor on June 30, 1934, and August 14, 1935, which assignments to the extent they undertook to convey a claim against the United States were null and void, *ab initio*, under the provisions of Section 3477, Revised Statutes, and conferred no right of succession (R. 105, 155);³ (b) petitioner was not "the person who paid the [manufacturers' excise] tax" within the requirement of Section 621 (d)

³ In this connection the District Court also concluded that the petitioner acquired no right to refund of the tax involved by virtue of the ownership of all of Pacific's stock, or by the dissolution of that company, or by the distribution in kind by that company of its assets (R. 155).

of the Revenue Act of 1932, and hence was not entitled to refund of it (R. 106, 156); and (c) that the evidence failed to establish that Pacific had absorbed the tax sued for, and had not passed it on to the vendees or purchasers of its tires (R. 107-108, 156).

The decision of the Circuit Court of Appeals.—In the Circuit Court of Appeals the United States defended the judgment of the District Court upon all the grounds that the United States had urged for judgment before the District Court, including the several grounds mentioned in footnote 1, *supra*, of this brief. The Circuit Court of Appeals passed upon only one of the grounds of defense, sustaining it, and in consequence found it unnecessary to express a conclusion concerning the other defenses. In summary, the Circuit Court of Appeals held that the ground for refund alleged in petitioner's first amended petition of February 1940 was different from the grounds for refund set up in petitioner's claims for refund; and that the United States had not waived the incompleteness of the claim as originally filed (R. 295-301).

ARGUMENT

The taxes here involved were paid by Pacific Goodrich Rubber Company, a wholly owned subsidiary of petitioner. Pacific assigned all of its assets to petitioner on June 30, 1934, for a good and valuable consideration (R. 148, 52), but pe-

petitioner continued to own the Pacific stock thereafter and until dissolution (R. 142), which was voted on July 6, 1934 (R. 147, 227), and effected December 21, 1934 (R. 141, 234-235). Refund claims were filed by both companies. Pacific's claim was rejected on the merits and petitioner's claim was rejected on the ground that it was a duplicate. (R. 149-150.)

In both its original and amended claims petitioner asserted its right to the refund on the ground of the assignment of June 30, 1934 (R. 211, 218), and not on the ground that petitioner as sole stockholder had acquired Pacific's assets on dissolution. However, in its first amended petition, on which the case was tried, petitioner shifted its ground and asserted that it acquired Pacific's assets by operation of law as sole stockholder, but it still contended that the acquisition occurred on June 30, 1934, and pleaded the assignment of that date and a further assignment of August 14, 1935 (R. 51-55).

The court below held that petitioner had sued on the basis of an interest different from that asserted in the refund claim and that this was a fatal variance. Thus the case involves petitioner's right to file a claim in one capacity and then sue in a different capacity, and the cases relied on for a conflict on this point present situations quite remote from the case at bar.

It is undisputed that the assignments of Pacific's claims were null and void under Section 3477 of the Revised Statutes (Appendix, *infra*, pp. 18-19), and that petitioner could not base a suit upon them. Thus petitioner faces a dilemma. If it has not shifted its position it is relying upon invalid assignments, as the District Court held. If it has shifted its position, there is a fatal variance, as the Circuit Court of Appeals held, and there is no decision to the contrary. Upon either basis it appears that petitioner is not entitled to recover, and, as explained in footnote 1, *supra*, the Government relies upon additional grounds not yet disposed of.

There is no occasion to consider whether such a variance could be waived. First, the Circuit Court of Appeals held that there had been no waiver, and, secondly, *United States v. Garbutt Oil Co.*, 302 U. S. 528, fully explains *Tucker v. Alexander*, 275 U. S. 228, and makes it clear that no officer of the Government has power to waive an objection which if insisted upon would defeat the claim. It is conceded (Pet. 5, 19) that the statute of limitations in this case had run on claims for refund on April 18, 1938. Since the first amended petition was filed on February 5, 1940, it is clear that any attempted waiver at that time would be invalid.

CONCLUSION

The decision below is correct. There is no conflict of decisions, and the case presents no federal question of general importance. The petition should be denied.

Respectfully submitted.

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AUGUST 1943.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

TITLE IV—MANUFACTURERS' EXCISE TAXES

SEC. 602. TAX ON TIRES AND INNER TUBES.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, 21 $\frac{1}{4}$ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

SEC. 621. CREDITS AND REFUNDS.

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

Agricultural Adjustment Act, c. 25, 48 Stat. 31:

TITLE I—AGRICULTURAL ADJUSTMENT

* * * * *

PROCESSING TAX

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided*, That upon any article upon which a manufacturers' sales tax

is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

* * * *

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

* * * *

FLOOR STOCKS

SEC. 16. (a) Upon the sale or other disposition of any article processed wholly by in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

Revised Statutes:

SEC. 3226 [as amended by Sec. 1103 (a), Revenue Act of 1932]:

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * * (U. S. C., Title 26, Sec. 3772 (a) (1).

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment

thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same (U. S. C., Title 31, Sec. 203).

Treasury Regulations 46 (relating to Excise Taxes on sales by the manufacturer under Sections 602 to 611, inclusive, 613 and 614 of the Revenue Act of 1932):

ART. 71 [as amended by T. D. 4358, XI-2 Cum. Bull. 516 (1932)].¹

A credit against tax under Title IV or a refund may be allowed or made to a manufacturer in the amount of any tax under Title IV which has been paid by any person with respect to the sale of any article (other than a tire or inner tube) purchased and used by such manufacturer as material in the manufacture or production of, or as a component part of, an article with respect to which tax under Title IV has been paid, or which has been sold free of tax by virtue of section 620, relating to sales for further manufacture. (See article 7.)

¹ No other change was thereafter made to the paragraphs of Article 71 quoted, *supra*, save for some slight rephrasing effected by T. D. 4853, approved August 16, 1938, 1938-2 Cum. Bull. 383, 387-388. These provisions of Article 71 were in effect continuously from the time they were promulgated, and were not removed from the regulation or suspended during an interim period, as petitioner suggests (Pet. 10, fn. 16).

The claim for refund must be supported by evidence showing (1) the name and address of the person who paid to the United States the tax for which refund is claimed, (2) the date of payment, (3) the amount of such tax, and (4) the fact that the article was so used. A credit must be supported by evidence of the same character. If it is impossible to furnish such evidence at the time when the credit is taken, a statement to that effect must be submitted with the return in which the credit is taken. The evidence supporting such credit must be filed with the collector within 30 days after the date on which the return is filed. If the required evidence is not so filed within that period, the amount of the credit will be disallowed and assessment of the tax resulting from the disallowance will be made on the current assessment list.

* * * *

If any person overpays the tax due with one monthly return, he may either file a claim for refund on Form 843 or take credit for the overpayment against the tax due with any subsequent monthly return. In all cases (except those referred to in section 621 (a), discussed under the preceding paragraphs of this article) where a person overpays tax, no credit or refund shall be allowed, whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has either repaid the amount of the tax to the ultimate purchaser of the

article or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written consent of the ultimate purchaser must accompany the sworn statement filed with the credit or refund claim. The statement supporting the credit or refund claim must also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed with the collector or Commissioner.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 158

THE B. F. GOODRICH COMPANY, A CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED-STATE CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 95-108) is reported at 48 F. Supp. 452. The opinion of the Circuit Court of Appeals (R. 285-301) is reported at 135 F. 2d 456.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 13, 1943 (R. 302). The petition for a writ of certiorari was filed July 13, 1943, and was granted October 11, 1943 (R. 304).

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the deduction proviso of Section 9 (a) of the Agricultural Adjustment Act is inoperative because not separable from the taxing provision in Section 9 (a), which this Court has held invalid.

2. If the deduction proviso of Section 9 (a) of the Agricultural Adjustment Act is separable from the remainder of Section 9 (a) and operative, whether that proviso undertakes to allow a deduction—against the weight of articles subject to the manufacturers' sales tax under Section 602 of the Revenue Act of 1932—for the weight of the material in those articles subjected to the tax imposed on floor stocks by Section 16 of the Agricultural Adjustment Act.

3. Whether the District Court erred in holding that petitioner had failed to prove that the Pacific Goodrich Rubber Company had "not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee."

4. Whether the variance between the cause of action for refund of taxes which the petitioner now asserts and the grounds set up in its claims

for refund is fatal; and, if so, whether the variance was waived.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 38-46.

STATEMENT

This is an action to recover manufacturers' excise tax paid under protest by the Pacific Goodrich Rubber Company, a Delaware corporation.¹ The case was tried in the District Court upon a stipulation of facts (R. 80-92, 161-162) including exhibits (R. 191-256). The pertinent facts may be summarized as follows:

The taxes paid and the claims for refund.— From August 1, 1933, to January 5, 1934, Pacific Goodrich Rubber Company, a wholly owned subsidiary of petitioner (R. 142) manufactured and sold tires containing 705,806 pounds of processed cotton on which it paid to the Collector of Internal Revenue the floor stocks tax provided for by Section 16 (a) of the Agricultural Adjustment Act (Appendix, *infra*, p. 41) (R. 144-146).² In computing the manufacturers' sales tax imposed

¹ The Collector to whom payment was made died prior to commencement of the action, which, therefore, was brought against the United States (R. 142).

² The floor stocks tax was at the rate of \$0.044184 per pound, and thus Pacific Goodrich Rubber Company paid \$31,185.33 in floor stocks taxes on the 705,806 pounds of processed cotton. (See R. 144-145.)

upon these tires by Section 602 (1) of the Revenue Act of 1932 (Appendix, *infra*, p. 38), Pacific Goodrich Rubber Company (herein referred to as "Pacific")—in reliance upon the proviso clause of Section 9 (a) of the Agricultural Adjustment Act (Appendix, *infra*, pp. 39-40)—deducted from the gross weight of such tires the 705,806 pounds of processed cotton on which it had paid the floor stocks tax (R. 145).

The Commissioner of Internal Revenue disallowed Pacific's deduction of the weight of the processed cotton from the gross weight of the tires in computing the manufacturers' sales tax, and demanded, as an additional tax, the sum of \$15,880.64, which was arrived at by applying the rate of the tax to the weight of processed cotton which Pacific had deducted in its computation of the tax (R. 146). Pacific paid the additional manufacturers' sales tax so demanded, and the assessed interest of \$569.75 thereon, on April 18, 1934, and July 27, 1934, respectively (R. 146, 197). No part of the additional tax or interest has been refunded either to Pacific or to petitioner (R. 150).³

On June 30, 1934, Pacific, by its president and its secretary, executed an assignment by which it assigned "to The B. F. Goodrich Company * * * all rights, claims, and choses in action

³ The record seems to establish, however, that a refund of \$62.52 of the interest was actually allowed April 12, 1935 (R. 202).

of every nature and description which said Pacific Goodrich Rubber Company now has or shall have * * *," and at the close of business on that day Pacific delivered all its assets in kind to the petitioner (R. 148; Ex. A, R. 191-193, 228, 230). The assignment was ratified by Pacific's board of directors and stockholders on July 6, 1934, "as a distribution in kind" of all the assets of the corporation to its sole stockholder, the B. F. Goodrich Company (R. 147, 228, 230). At the same time the stockholders directed the officers of the corporation to convey to petitioner all of Pacific's real estate and to take the measures necessary to dissolve the corporation (R. 230-231). Pursuant to the latter direction Pacific was dissolved on December 21, 1934 (R. 141, 233-235).

On August 14, 1935, the officers of Pacific executed on behalf of the corporation a second assignment (R. 148; Ex. B, R. 194-195), under the terms of which Pacific did "sell, assign, and transfer" to petitioner "all claims, demands, choses in action or cause or causes of action of whatsoever kind," including "particularly its claim for refund of excise tax illegally paid to the United States * * * in the sum of \$16,450.39. * * *."

Pacific and petitioner filed, on August 31, 1935, claims for refund of the additional manufacturers' sales taxes and interest which Pacific had paid (Ex. D, R. 199-202; Ex. F, R. 209-214).

Both of these claims were predicated upon the ground that Pacific was entitled under the proviso of Section 9 (a) of the Agricultural Adjustment Act, to deduct from the gross weight of the tires the weight of the processed cotton contained therein on which Pacific had paid a floor stocks tax under Section 16 (a) of the Act. In addition, petitioner stated in its claim for refund (Ex. F; R. 209-213) that it was entitled to the refund by virtue of the assignment made to it by Pacific on June 30, 1934 (R. 148-149, 211-213).

Pacific and petitioner filed amended claims for refund on April 21, 1936, which differed from the original claims only in the statement that Pacific had not included the taxes in the prices of the tires on which the tax was assessed (R. 149; Ex. E, R. 204-208; Ex. G, R. 215-220).

The Commissioner on April 8, 1936, rejected Pacific's original claim for refund (R. 150) and on May 22, 1936, its amended claim for refund (R. 223-224). A ground common to both letters of rejection was that Section 9 (a) of the Agricultural Adjustment Act did not authorize a deduction of the weight of the cotton contents of tires on which a floor stocks tax had been paid under Section 16 (a) of that act, in computing the manufacturers' sales tax imposed on tires by Section 602 (1) of the Revenue Act of 1932. A further reason given for the rejection of Pacific's amended claim was that such claim failed to set

forth any new and material evidence. (R. 223-224.)

On the same day, May 22, 1936, the Commissioner, by letter sent to petitioner, rejected petitioner's original and amended claims (R. 149-150).

The pleadings and trial.—On October 1, 1937, petitioner filed in the District Court its original petition (R. 2-25) for recovery of the additional manufacturers' excise tax collected from Pacific in 1934. That petition asserted title to Pacific's choses in action by virtue of the assignment of June 30, 1934, set forth in the petition (R. 6-25).

The United States demurred (R. 28-31), and later amended its demurrer to add a challenge under R. S. 3477 (Appendix, *infra*, pp. 44-45) to the validity of Pacific's assignment of June 30, 1934 (R. 33-34). On May 21, 1938 (R. 38), petitioner then amended its petition to set forth Pacific's assignment of August 14, 1935 (R. 35-37). The United States demurred to the petition as amended on the grounds set forth in its original demurrer as amended (R. 39); this demurrer was overruled (R. 41). The United States then answered (R. 41-48). The answer did not assert that there was a variance between the claim for refund and the petition as amended; it did allege, among other things, that the provision of the Agricultural Adjustment Act for a deduction from the weight of articles subject to manufacturers' excise tax under the Revenue Act of 1932 in

terms applied only where "a processing tax" had been paid and did not apply where, as here, the taxes paid were floor stocks taxes (R. 42-43), and, in any event, was invalid "for the reason that said Agricultural Adjustment Act as to the payment or collection of alleged taxes thereunder has been held to be unconstitutional and null and void and of no effect" (R. 48).

Thereafter, on February 5, 1940, petitioner filed its first amended petition (R. 50-78) which differed little from the original petition save to allege (R. 51) that petitioner as the sole stockholder of Pacific "became by operation of law, pursuant to a distribution in kind to it by Pacific * * *," on June 30, 1934, the sole owner of "all the rights, claims, and choses in action" which Pacific then had. Pacific's assignments of June 30, 1934, and August 14, 1935, were set out at length "as physical evidence, affirmative proof and in confirmation of" this allegation (R. 51). Three days before the filing of this first amended petition the parties stipulated that the original petition as amended might be "amended in the particulars as set forth in plaintiff's First Amended Petition," and that the Government's previous answer as amended should be deemed an answer to petitioner's first amended petition (R. 78-79). The case was then tried February 10, 1940 (R. 93).

The facts, including exhibits (R. 191-256), were stipulated (R. 80-92, 161-162). As the District

Court noted (R. 108), no books of account, sales records; or other documentary evidence were submitted as evidence that the taxpayer had not included the manufacturers' sales tax in the price of the tires with respect to which it was imposed or had not collected the amount of the tax from the vendees.

Part of the stipulation was as to the testimony which two officers of the taxpayer would give, if sworn as witnesses, and the District Court found (R. 152) that the two witnesses testified as stipulated (R. 81-83, 84-86, 87-89, 90-92). This testimony was received subject to the objection of the Government as to its sufficiency to prove the fact in issue (i. e., that Pacific had not passed the tax on to its vendees) (R. 108; cf. 119, 138).

The testimony so stipulated may be summarized thus:

The secretary of the taxpayer, Pacific Goodrich Rubber Company, one J. C. Herbert, testified (R. 81-83) that he had charge of the books and records of that corporation and knew that petitioner owned all of Pacific's issued shares, and the witness identified the two assignments of assets (Ex. A and B, R. 191-193, 194-196) executed by Pacific to the petitioner under dates of June 30, 1934, and August 14, 1935, respectively.

George Hubbell, who was cashier and at times auditor of Pacific, testified that he kept the books and records of Pacific (R. 84); that they showed

the quantity and type of tires which that company manufactured between August 1, 1933, and January 5, 1934, and the amount of cotton therein which on August 1, 1933, was contained in articles which Pacific owned and which were processed from cotton (R. 84); that he knew whether or not there was included in the price of the tires which Pacific manufactured and sold during the period August 1, 1933, to January 5, 1934, any amount to cover any excise tax on the processed cotton contained in those tires, and whether any additional billing was ever made to purchasers of those tires after the assessment of the additional manufacturers' excise tax which is in suit (R. 85); that Pacific did not include nor intend to include in the price of its tires sold from August 1, 1933, to January 5, 1934, any amount to cover any excise tax on the processed cotton contained in the tires manufactured and sold during that period (R. 91); that the prices at which Pacific sold its tires during that period, containing processed cotton on which a tax was payable under Section 16 of the Agricultural Adjustment Act, were no greater than the prices at which it sold tires containing processed cotton on which a tax was payable under Section 9 (a) of that Act; and that no additional billing was made to the purchasers of taxpayer's tires after the assessment of the additional manufacturers' excise tax, now in suit (R. 91-92).

The decision of the District Court.—The District Court held (1) that the literal language of the proviso clause of Section 9 (a) of the Agricultural Adjustment Act should be disregarded in favor of a construction permitting taxpayers to compute any manufacturers' sales tax imposed on them by Section 602 of the Revenue Act of 1932, by deducting from the gross weight of the tires sold the weight of the processed cotton therein on which they had paid either a processing tax under Section 9 (a) or a floor stocks tax under Section 16 of the Agricultural Adjustment Act (R. 98-100, 153); (2) that the proviso clause of Section 9 (a) of the Agricultural Adjustment Act was valid despite the unconstitutionality of all other provisions of Section 9 (a) and Section 16 (R. 100, 154-155). The District Court then held (R. 102-108, 155-156), however, that petitioner was not entitled to recover the manufacturers' excise tax which Pacific had paid, because: (a) Petitioner's right, if any, to refund vested in it by reason of the two written assignments which Pacific executed in petitioner's favor on June 30, 1934, and August 14, 1935, which assignments to the extent they undertook to convey a claim against the United States were null and void, *ab initio*, under the provisions of Section 3477, Revised Statutes, and conferred no right of succession (R. 105, 155).; (b) petitioner was not "the person

*In this connection the District Court also concluded that the petitioner acquired no right to refund of the tax involved

who paid the [manufacturers' excise] tax" within the requirement of Section 621 (d) of the Revenue Act of 1932, and hence was not entitled to refund of it (R. 106, 156); and (c) that the evidence failed to establish that Pacific had absorbed the tax sued for, and had not passed it on to the vendees or purchasers of its tires (R. 107-108, 156).

The decision of the Circuit Court of Appeals.—

In the Circuit Court of Appeals the United States defended the judgment of the District Court upon the several grounds considered and passed upon by the District Court (R. 95-108, 153-156). The Circuit Court of Appeals, however, passed upon only one of the grounds of defense, sustaining it, and in consequence found it unnecessary to express a conclusion concerning the other defenses. In summary, the Circuit Court of Appeals held that the ground for refund alleged in petitioner's first amended petition of February 1940 was different from the grounds for refund set up in petitioner's claim for refund; and that the United States had not waived the variance (R. 295-301).

SUMMARY OF ARGUMENT

1. The proviso in Section 9 (a) of the Agricultural Adjustment Act of 1933, which authorizes a deduction for purposes of the manufacturers' sales tax on account of cotton on which the proc-

by virtue of the ownership of all of Pacific's stock, or by the dissolution of that company, or by the distribution in kind by that company of its assets (R. 155)..

processing tax was paid, became inoperative when this Court held in *United States v. Butler*, 297 U. S. 1, that the taxing provisions in that Act were unconstitutional. Therefore it is not material whether the deduction proviso applied to cotton subjected to the floor stocks tax.

The deduction proviso was an adjunct of the invalid taxing provision and would have been meaningless without it. Clearly Congress would not have enacted the deduction proviso had it not also enacted the taxing provision. Moreover, Congress would not have wished the deduction proviso to remain effective after the invalidation of the processing tax because to do so would give taxpayers a deduction under the manufacturers' sales tax on account of a tax they did not have to pay and could recover from the collector. Such a consequence would result in tax exemption instead of relief from double taxation, a result Congress would not intend.

This conclusion is borne out by two actions taken by Congress after the *Butler* decision. Congress enacted elaborate provisions for the refund of processing taxes and others collected under the Act, and these provisions authorized refunds without diminution on account of any tax benefit obtained under the manufacturers' tax; in view of Congress' evident purpose that invalid taxes should be refunded only to the extent they had not been passed on, it is clear Congress believed that

none of the invalid taxes would be passed on to the Government through the deduction proviso. Moreover, Congress reenacted the portions of the Act which it intended to remain operative and expressly stated that the reenacted provisions were intended to remain effective notwithstanding the *Butler* decision. As neither the deduction proviso nor any other portion of Section 9 (or Section 16, the floor stocks provision) was thus reenacted, it is evident that Congress did not intend the deduction proviso to survive the *Butler* decision.

2. Even if still operative, the deduction proviso could not properly be construed to authorize a deduction on account of cotton subjected to the floor-stocks tax. The latter tax was imposed by Section 16 (a) (1), the processing tax by Section 9 (a). The deduction proviso was attached to the latter section and by its terms applied only to cotton on which "a processing tax" was paid. The floor-stocks tax, a companion to the processing tax, was not a tax on processing as defined in the Act but on the ownership on a certain day of goods which had already been processed.

The literal language of the Act expresses the Congressional purpose. If Congress had extended the deduction proviso to floor-stocks taxes it would have allowed a deduction for a tax destined to be refunded under Section 16 (a) (2) whenever the Secretary should declare the proc-

essing tax terminated as to cotton. Furthermore, the history of the proviso in Congress shows that it was the subject of study and some revision, so its language must be accepted as having been deliberately chosen.

3. Even if the proviso were still operative and could be construed as petitioner must contend that it should be, the decisions below against petitioner would be supportable. The trial court found that the evidence did not show that the taxpayer had not passed the tax on to its customers and therefore a necessary statutory requirement was not met. The record does not justify that this finding be disturbed.

4. The court below held that a fatal variance existed between petitioner's claims for refund and its amended complaint, and that the Government had not waived the variance. The absence of a waiver is clear since even an express waiver would have been ineffective, and since a waiver cannot be found from the mere failure of the Government to make a particular argument in the trial court. The decision that a fatal variance existed appears to be a logical extension of well settled rules.

ARGUMENT

Introductory.—In the District Court and the Circuit Court of Appeals, the United States urged points I, II, and III hereinafter argued. Point IV, argued in the Circuit Court of Appeals and on

which its decision for the United States rests, was not urged in the District Court but was suggested by that court's opinion (R. 95, 102-103). In its brief in opposition to the granting of certiorari (p. 2), the United States made known the existence of issues not adverted to in the opinion below and its intention, should certiorari be granted, of arguing them. In this brief we argue Point I, on which we believe affirmance should rest, Point II, which we believe logically need not be reached because of Point I but which is equally clear, and Points III and IV, on which the decisions below rested (cf. *Le Tulle v. Scofield*, 308 U. S. 415, 421).

I

~~WHEN THE TAXING PROVISIONS IN SECTIONS 9 (A) AND 16 (A) (1) OF THE AGRICULTURAL ADJUSTMENT ACT OF 1933 WERE DECLARED INVALID BY THIS COURT THE DEDUCTION PROVISIO IN SECTION 9 (A) BECAME INOPERATIVE~~

Section 9 (a) of the Agricultural Adjustment Act of 1933 (Appendix, *infra*, pp. 39-40) imposed a processing tax and concluded with a proviso that amounts of cotton subjected to this tax should be allowed as a deduction in the computation of manufacturers' sales taxes imposed by the Revenue Act of 1932 on the basis of weight. Section 16 (a) (1) of the Agricultural Adjustment Act of 1933 (Appendix, *infra*, p. 41) imposed a companion tax on floor stocks, without such a proviso.

The parties are in disagreement as to whether the proviso in Section 9 (a) authorized a deduction for cotton subjected to the floor-stocks tax as well as for that subjected to the processing tax, and in the next succeeding portion of this brief (*infra*, pp. 23-30) we argue that it did not. However, the Court need not settle that disagreement if, as we believe, the proviso became inoperative when this Court in *United States v. Butler*, 297 U. S. 1, declared that the taxing provisions (Sections 9 (a) and 16 (a) (1)) were unconstitutional. And, as stated, we believe that the proviso became inoperative and does not authorize any deduction at all since it was designed solely to prevent double taxation arising from the imposition of two taxes on the same subject and one of those taxes was held unconstitutional and uncollectible.

The District Court passed on this contention adversely to our position (R. 100), on the sole ground that Section 14 of the Act (Appendix, *infra*, p. 40) declared the Act separable.⁶ It seems clear, however, that this omnibus separability provision is not conclusive.⁷ To give con-

⁶ The Circuit Court of Appeals did not reach the point since it decided the case favorably to the Government on another ground (R. 295-301).

⁷ In fact, it was disregarded by this Court in *United States v. Butler*, *supra*. The taxes there invalidated did not themselves regulate production, as those invalidated in the *Child Labor Tax Case*, 259 U. S. 20, had sought to do; on the contrary, they were held invalid because of the use to which their proceeds were to be put—regulation of production.

clusive effect to omnibus separability provisions often would produce results manifestly not desired by the legislature. An example of this is *Mazurek v. Farmers' Mutual Fire Ins. Co.*, 320 Pa. 33, in which the only valid provision of an act, except for the separability provision itself, was a section repealing the earlier law which the invalid act was to replace. To have given blind effect to the separability clause would have produced an abyss in the law, clearly not intended by the legislature; the separability provision was disregarded and the repealer held inoperative. The decisions of this Court recognize the impropriety of being blindly bound by omnibus separability clauses and establish that they create a presumption of separability and no more. *Electric Bond Co. v. Securities and Exchange Commission*, 303 U. S. 419, 434.* The presumption is, of course, a strong one, as Chief Justice Hughes stated in his dissent in *Carter v. Carter Coal Co.*, 298 U. S. 238, 322:

* * * when Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision

If the separability provision had been applied, the spending provisions would have been separated from the otherwise valid taxing provisions and the latter would have remained effective.

* For a discussion of the effect given separability clauses by this Court and a criticism of omnibus separability clauses, see Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Har. L. Rev. 76, 114-122, 123-128.

shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.

The "inextricable tie" between the deduction proviso and the taxing provisions in the instant case is only slightly less obvious than was that between the repealer and the remainder of the act in *Mazurek v. Farmers' Mutual Fire Insurance Co.*, *supra*. Of course Congress would not have enacted the deduction proviso had it not also enacted the taxing provisions. Without the taxing provisions, there would have been neither the double taxation intended to be avoided nor a processing tax to give rise to the condition on which the proviso was to allow a deduction. Thus if the test of separability is, as this Court has sometimes said,⁹ whether Congress would have enacted the one if it had not also enacted the other, the deduction proviso is *a fortiori* inseparable and inoperative.

A test of separability more often stated and which probably is a more accurate guide is whether the legislature would have wished the provision in question to remain operative if other

⁹ *Utah Power & L. Co. v. Pfost*, 286 U. S. 165, 184-185; *Carter v. Carter Coal Co.*, 298 U. S. 238, 312-313. This test was, however, not applied in *Kay v. United States*, 303 U. S. 1, 7, where a section was held separable which would not have been passed had not the rest of the act been passed but which Congress would have wanted to remain effective even if the rest of the act were held invalid.

portions of the act should subsequently be held invalid. *Dorchy v. Kansas*, 264 U. S. 286, 289-290; *Williams v. Standard Oil Co.*, 278 U. S. 235, 241.¹⁰ Under this test as well, the conclusion seems warranted that the proviso became inoperative when the taxing provisions were held invalid. It seems unreasonable to suppose that Congress would have wanted the valid manufacturers' sales tax to be reduced on account of the payment of an unconstitutional processing tax. Unless special legislation should be passed, one who paid an unconstitutional tax presumably would have a common law action of assumpsit against the collector for its recovery (cf. *Annis-ton Mfg. Co. v. Davis*, 301 U. S. 337, 341-342; *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 379), and any judgment against the collector would be paid from the Treasury (R. S. 989, 28 U. S. C. 842). Probably any such recovery would be of the entire unconstitutional tax paid, without offset for any saving effected under other taxing statutes by reason of the deduction proviso. If at the same time the deduction in computing the manufacturers' sales tax should remain in effect, the deduction proviso, no longer necessary to prevent double taxation, would become the source of an exemption even from single taxation. The

¹⁰ As noted in footnote 9, *supra*, p. 19, the decision in *Kdy v. United States*, *supra*, is reconcilable with this test and not with the preceding one.

conclusion is therefore justified, we submit, that Congress must have intended the deduction proviso to be "inextricably tie(d)" to the taxing provisions, and to become inoperative if the taxing provisions should fall.¹¹

This conclusion need not, however, rest upon assumptions however well grounded. Congress took action after the decision in *United States v. Butler*, *supra*, which demonstrates that it regarded the deduction proviso as "inextricably tie(d)" to the taxing provisions and hence inoperative. It added to the Revenue Act of 1936 a complete title (Title VII; Secs. 901-917) providing elaborately for the refund of the invalid processing taxes and floor stocks taxes (49 Stat. 1747).¹² This title became effective June 22, 1936,¹³ less than six months after the *Butler* decision. Significantly, although it carefully limits the permissible refund to insure that the taxpayer will not secure a refund of taxes which he passed

¹¹ For decisions holding inoperative provisions which, like the deduction proviso, were merely adjunctive to the provisions held invalid, see: *Williams v. Standard Oil Co.*, 278 U. S. 235, 243; *Poindexter v. Greenhow*, 114 U. S. 270, 304-306; *Retirement Board v. Alton R. Co.*, 295 U. S. 330, 362.

¹² Under this title Pacific became entitled to a refund of the floor stocks taxes it had paid, if it could establish that it had not passed the tax on to its customers. The record does not show whether either Pacific or petitioner claimed such a refund.

¹³ It was upheld in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337.

on to others and which consequently represented no burden to him (Section 902, Appendix *infra*, pp. 41-42; section 907), it contains no provision reducing the refund by amounts which he passed on to the Government through a deduction in computing the manufacturers' sales tax." In view of Congress' concern that the taxpayer recover only the tax which had burdened him, this omission cannot be attributed to a desire to let the taxpayer have his refund and the manufacturers' sales tax saving too. The only rational explanation is that Congress regarded the deduction proviso as inoperative with the result that the deduction would be disallowed in computing the manufacturers' sales tax.

"The only provision which could be offered in support of a contrary position is Section 911, which states: "No refund shall be made or allowed of any amount paid or collected as tax under the Agricultural Adjustment Act, as amended and reenacted, to the extent that refund or credit with respect to such amount has been made to any person." On its face this provision appears inapplicable since the deduction proviso in Section 9 (a) authorized neither a refund nor a credit but a deduction. This construction is confirmed by the statement of the originators of Title VII, the Senate Committee on Finance, in their report (S. Rep. 2156, 74th Cong., 2nd sess.) where they say (p. 36): "Section 911 is designed to prevent two refunds with respect to the same amount collected under the Agricultural Adjustment Act." The original act contained provisions authorizing refunds in numerous situations; which were reenacted by Title IV of the Revenue Act of 1936. The desire was to prevent duplicate refunds under these various provisions. See also Article 205, Treasury Regulations 96.

A further Congressional act points to the same conclusion. By the Act of June 3, 1937, c. 296, Secs. 1 and 2 (50 Stat. 246; 7 U. S. C., Sec. 601 note), Congress reenacted most of the provisions of the Agricultural Adjustment Act of 1933, but not Sections 9 and 16. That this action is to be taken as an indication of what provisions Congress thought separable from the unconstitutional provisions is evidenced by the preamble to the 1937 Act, in which Congress said in part:

The following provisions * * * having been intended to be effective irrespective of the validity of any other provision of that Act are expressly affirmed and validated, and are reenacted * * * .

We submit therefore that the deduction proviso in Section 9 (a) became inoperative when the taxing provisions fell. This point is dispositive of the case and we suggest that the succeeding points accordingly need not be considered. They are, however, fully discussed hereinafter.

II

IF THE DEDUCTION PROVISIO WERE STILL OPERATIVE, IT WOULD NOT AUTHORIZE A DEDUCTION IN THE COMPUTATION OF THE MANUFACTURERS' SALES TAX ON ACCOUNT OF COTTON ON WHICH A FLOOR STOCKS TAX WAS PAID

In computing the manufacturers' sales tax due from it under Section 602 (1) of the Revenue Act of 1932 (Appendix, *infra*, p. 38), for tires

sold, Pacific deducted from the gross weight of the tires the 705,806 pounds of processed cotton contained in the tire fabrics, threads, and other material from which the tires had been made and upon which Pacific had paid a floor stocks tax pursuant to Section 16 of the Agricultural Adjustment Act (R. 143-145). Pacific did this upon the theory that the proviso clause to Section 9 (a) of the Agricultural Adjustment Act authorized it. The Commissioner disallowed the deduction and assessed a deficiency (R. 88), which was paid (R. 89) and is the subject of this action for refund.

Section 9 (a) of the Agricultural Adjustment Act (Appendix, *infra*, pp. 39-40) in terms authorized the collection of a processing tax (later declared by this Court to be unconstitutional, *United States v. Butler*, 297 U. S. 1) "upon the first domestic processing of" any agricultural commodity which the Secretary of Agriculture should determine to be basic. Section 9 (d) (2) of the Agricultural Adjustment Act (Appendix *infra*, p. 40) defined, in the case of cotton, the term "processing" as meaning "the spinning, manufacturing, or other processing (except ginning) of cotton." The section was prospective in its operation.

The proviso clause of Section 9 (a) authorized a deduction under defined circumstances for manufacturers' sales tax purposes where "a *processing* tax has been paid." (Italics ours.) This clause read as follows:

Provided, That upon any article upon which a manufacturer's sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturer's sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid. [Italics ours.]

Thus from the statutory definition it appears that a deduction was authorized on account of the payment of a tax on "the spinning, manufacturing, or other processing (except ginning) of cotton."

In its original official appearance in the Statutes at Large, Section 16 appears under the title "Floor Stocks" (48 Stat. 40). It imposed a tax, which came to be known as the "floor stocks tax," on finished goods held for sale or other disposition (except retail sale) at the time when the processing tax should become effective on the commodity contained in processed form in those goods (Section 16 (a) (1), Appendix, *infra*, p. 41). This "floor stocks tax" was in an amount equal to the processing tax, which it thus complemented. It was not, however, a "processing tax," as Congress itself expressly recognized in 1935 when it added Section 7 (7) [7 U. S. C. 608 (7)] and referred to the two taxes as "the processing tax, and/or the corresponding floor-stocks tax" (49

Stat. 752).¹⁵ Since Section 16 did not contain a deduction proviso, nor refer to that in Section 9 (a) which by its own terms applied only where the "processing tax" was paid, it is evident that the language of the Act, literally applied, does not authorize a deduction on account of cotton subjected to the "floor stocks tax."

Application of the usual rules of construction would disallow the deduction sought: a proviso is presumed in the absence of evidence of a contrary intention to refer "only to the provision to which it is attached" (*United States v. McClure*, 305 U. S. 472, 478); a deduction will not be held allowable unless it comes clearly within a statutory provision therefor (*Helvering v. Ohio Leather Co.*, 317 U. S. 102, 106). Disregard of these rules and an independent search for the Congressional intent will produce the same result.

1. Allowance of the deduction in the case of the floor stocks tax was not necessary to prevent the double taxation sought to be avoided. Supple-

¹⁵ Congress emphasized the distinction between the two taxes by providing different procedures for the refund of each after their invalidation in *United States v. Butler*, *supra*. Claims for refund of processing taxes, if denied by the Commissioner, went to the Processing Tax Board of Review, with appeal to the circuit courts of appeals (Rev. Act of 1936, Sec. 906, Appendix, *infra*, p. 43). If claims for refund of floor stocks taxes were denied by the Commissioner, suit therefor could be brought in the Court of Claims or the district courts (*id.* Sec. 905, Appendix, *infra*, p. 43). See *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, 341-345, where the two procedures are contrasted and upheld.

menting the floor stocks tax was a floor stocks refund which would normally be expected to cancel out the floor stocks tax. . The operation of the tax scheme was as follows: whenever the Secretary of Agriculture should determine that conditions with respect to a particular commodity made benefit payments desirable he would so proclaim and the processing tax would then become effective as to processing occurring thereafter (Sec. 9 (a), Appendix, *infra*, pp 39-40); the floor stocks tax thereupon would become due from the person in possession of floor stocks then on hand processed from that commodity (Sec. 16 (a) (1), Appendix, *infra*, p. 41); the processing tax would continue in effect until the Secretary should determine that benefit payments with respect to that commodity were no longer necessary, and would terminate at the close of the marketing year in which the Secretary should proclaim that determination (Sec. 9 (a)); on such termination of the processing tax, the person then in possession of floor stocks processed from that commodity would become entitled to a refund equal to the processing tax on the commodity contained in the floor stocks (Sec. 16 (a) (2), Appendix, *infra*, p. 41). Under this system a payment of floor stocks tax would be balanced by a refund on the termination of the processing tax on the commodity involved. If the inventory of the taxpayer remained constant the tax and the refund would be equal; if the inventory

fluctuated the refund might be either greater or less than the floor stocks tax. If Congress had intended to allow a deduction under the proviso in Section 9 (a) on account of floor stocks taxes, it is reasonable to suppose ~~that it~~ would not have wished the deduction to exceed the amount of cotton subjected to the floor stocks tax and not compensated for by the refund. But elaborate provisions would have been needed so to limit the deduction, and none which would do so are to be found in the Act.

2. The legislative history of the provision suggests that the limitation of the deduction proviso to processing taxes was deliberate. The proviso, which was not contained in the original bill, in that which first passed the House, nor in the bill reported by the Senate committee, first appeared as a Senate floor amendment proposed by Senator Bulkley (77 Cong. Rec. 1959). While its original form was different from the final form, it nevertheless limited the deduction to cotton on which "the processing tax" was paid (*id.*). The explanation by its proponent referred to a desire to avoid double taxation from the imposition of "the processing tax" (*id.*).¹⁶ The amendment was adopted (77 Cong. Rec. 1960) but was changed to its present form in the conference (77 Cong. Rec.

¹⁶ Senator Smith for the committee stated that the amendment had been offered in committee and rejected not because it was objectionable but because it seemed too unimportant (77 Cong. Rec. 1960).

3022-3023), and so adopted. The House managers stated the reason for the change as follows (77 Cong. Rec. 3025):

The conference agreement makes it clear that this provision is to apply only in cases in which the processing tax has actually been collected and not refunded.

The significance of this statement is twofold: *first*, it shows that the fitness of the language used gave Congress some concern and the language eventually adopted was the result of study and alteration; *second*, the desire to limit the deduction to preclude one where the processing tax was paid but later refunded suggests that a deduction for the floor stocks tax was not authorized because as explained above an amount equal, or approximately so, to that tax would be refunded to the floor stocks taxpayer on termination of the processing tax.

Consequently we submit that even if it were presently operative the deduction proviso in Section 9 (a) would not authorize the deduction here sought. The District Court, which held otherwise, erred in departing from the language of the statute in preference to what it thought was a more just and equitable construction based on its understanding of the statutory scheme (R. 98-100).¹⁷ The court overlooked, it appears, the

¹⁷ The court's technique of fitting an unambiguous statute which is an act of legislative grace to its own notions of justice and equity appears to be inconsistent with *Riley Co. v.*

effect of the floor stocks refund provision (Sec. 16 (a) (2)) and the fact that its construction would give the taxpayer a deduction on account of a tax later to be refunded. However, as the District Court decided in favor of the Government on other grounds, its decision, affirmed by the Circuit Court of Appeals, was correct notwithstanding the error in its views on this point.

III

THE FINDING OF THE DISTRICT COURT THAT THE EVIDENCE DID NOT ESTABLISH THAT PACIFIC HAD NOT PASSED ON THE BURDEN OF THE TAX SHOULD NOT BE DISTURBED

Whether the economic burden of the manufacturers' sales taxes was passed on to Pacific's customers was a question of fact for the trial court to decide. Cf. *United States v. Jefferson Electric Co.*, 291 U. S. 386, 407; *Colorado Bank v. Commissioner*, 305 U. S. 23 (in which the evidence was stipulated—see p. 28). The statute (Section 621 (d), Revenue Act of 1932, Appendix, *infra*, pp. 38-39) requires¹⁸ that the person who paid the manufacturers' sales tax establish, in accordance with Regulations prescribed by the Commissioner with the approval of the Secretary, that the tax was not included in the price of the article.

Commissioner, 311 U. S. 55, and *Helvering v. Ohio Leather Co.*, *supra*.

¹⁸ Cf. Section 424 (a), Revenue Act of 1928, c. 852, 45 Stat. 791, involved in *United States v. Jefferson Electric Co.*, *supra*.

or if included that the tax was repaid to the ultimate purchaser, or that the taxpayer filed with the Commissioner the written consent of the ultimate purchaser to the allowance of the refund. The Regulations promulgated to implement that section of the statute are Article 71, Treasury Regulations 46 (Appendix, *infra*, pp. 45-46),¹⁹ which require the person who paid the tax to file a claim with supporting data with the Commissioner as a condition precedent to a right to sue. Petitioner's claim is barred for failure of either Pacific or the petitioner to comply with that regulation, for their claims asserted nothing as to the necessary facts, but only asserted conclusions (R. 206-217). *United States v. Andrews*, 302 U. S.

¹⁹ The provisions of Article 71 were not excised even temporarily from the Regulations by T. D. 4605, XIV-2 Cum. Bull. 386 (1935), as petitioner asserts. (Br. 9-10, fn. 17.) New paragraphs were added to Article 71 by T. D. 4413, XII-2 Cum. Bull. 341, 342 (1933), and T. D. 4427, XIII-1 Cum. Bull. 389 (1934), for the purpose of implementing a new subparagraph (3) of Section 621 (a) of the Revenue Act of 1932 (as added by Section 4 (c), Act of June 16, 1933, c. 96, 48 Stat. 254, 255). Section 621 (a) (3) of the 1932 Act was then amended by Section 401 (b), Revenue Act of 1935, c. 829, 49 Stat. 1014. T. D. 4605 merely implements subparagraph (3) of Section 621 (a) of the statute as so amended, and the opening paragraphs of T. D. 4605 show that to be its purpose. *Shotwell Mfg. Co. v. Harrison*, 27 F. Supp. 422 (N. D. Ill.), is to the contrary, but wrong. Notwithstanding Judge Holley's ruling of April 5, 1938, the taxpayer stipulated the following month for the dismissal of its action with prejudice, and on June 15, 1938, that action was dismissed with prejudice.

517, 521. Moreover, there was no convincing evidence even at the trial.

Petitioner's only evidence in the District Court on this important factual point consisted of the conclusions (submitted in stipulation form) of one of its officers, its cashier-auditor (R. 84-85, 90-92). This evidence was submitted to the trial court subject to objection reserved by the Government as to its sufficiency as proof (R. 107, 108). It was not, as the trial court noted (R. 108), supplemented by corporate books of account, sales records, or other documentary evidence in support of the witness' conclusion that Pacific had not passed on the burden of the manufacturers' sales tax, and petitioner gave no explanation for the nonproduction of the crucial records. In these circumstances we submit that the District Court's finding that the proof failed to establish that Pacific had itself absorbed the burden of the tax should not be disturbed. *Luzier's, Inc. v. Nee*, 106 F. 2d 130 (C. C. A. 8th); certiorari denied, 309 U. S. 660. Cf. *Cudahy Packing Co. v. United States*, 126 F. 2d 429, 431 (C. C. A. 7th); *United States v. H. T. Poindexter & Sons Mer. Co.*, 128 F. 2d 992 (C. C. A. 8th); *Cotan Corp. v. United States*, 51 F. Supp. 598 (D. N. J.); *Lee Rubber & Tire Corp. v. United States*, 49 F. Supp. 6 (E. D. Pa.), all of which were suits for refund of floor stocks taxes paid under the Agricultural Adjustment Act. Cf. also *Finck Cigar*

Co. v. Commissioner, 134 F. 2d 261, 262-263 (C. C. A. 5th), certiorari denied October 11, 1943; *Honorbilt Products, Inc. v. Commissioner*, 119 F. 2d 797 (C. C. A. 3rd), both of which were suits for refund of processing taxes paid under the Agricultural Adjustment Act. See also *Cassatt v. Commissioner*, 137 F. 2d 745, 748 (C. C. A. 3rd), an income-tax case where there was stipulated testimony which the Board of Tax Appeals held insufficient.

IV

THE VARIANCE BETWEEN THE CLAIMS FOR REFUND, THE PLEADINGS, AND THE CAUSE OF ACTION SOUGHT TO BE LITIGATED

Q

Government counsel in the District Court did not raise the question of variance between the claims for refund and petitioner's pleadings, or between the pleadings and the cause of action which petitioner sought to litigate, but relied upon the three other defenses, already discussed in this brief, any one of which, if sustained, would be dispositive of this case. The question of material variance was suggested by the opinion of the District Court (R. 102-104). That court concluded, however, that petitioner's title to the taxpayer's tax-refund rights had vested in the petitioner not by operation of law but by virtue of the two specific assignments of June 30, 1934, and August 14, 1935, respectively, for expressed valuable consideration, that such assignments

were void *ab initio* under Section 3477 of the Revised Statutes (31 U. S. C. 203; Appendix, *infra*, pp. 44-45), and hence that petitioner acquired no rights under them to any refund of the tax in suit (R. 105, 106-107, 155).

The Government supported the judgment before the Circuit Court of Appeals upon the ground of variance suggested by the District Court, as well as upon the several grounds which the Government had urged before the trial court. The Circuit Court of Appeals passed upon only one of the several grounds of defense urged before it and sustained that defense. In summary, the Circuit Court of Appeals held that the grounds for refund alleged in petitioner's first amended petition, filed February 5, 1940, were different from the grounds for refund set up in petitioner's claims for refund and that the United States had not waived the variance (R. 295-301).

Proceeding first to petitioner's contention that the United States waived the variance by failure to object to it in the District Court, the initial objection to this contention is that a waiver by the Government must be found if at all from affirmative acts, not from the negative act of failing to raise a particular objection. *Tucker v. Alexander*, 275 U. S. 228, the foundation of petitioner's waiver argument, involved an oral stipulation between

counsel which was construed as an express waiver which in the particular circumstances of that case Government counsel was competent to make. Mere failure to make an available argument has not been regarded as a waiver and respondents (or appellees) have been held entitled to present in support of judgments arguments not made in the lower court. See *Helvering v. Gowran*, 302 U. S. 238, 245-246; *LeTulle v. Scofield*, 308 U. S. 415, 421.

The second objection to petitioner's waiver argument is that even an express attempt to waive the variance by Government counsel would have been ineffective, since the attempt would have occurred long after the expiration of the period for filing claims for refund.²⁰ See *United States v. Garbutt Oil Co.*, 302 U. S. 528, 534, in which *Tucker v. Alexander*, *supra*, on which petitioner relies, was explained and limited.²¹

²⁰ Pacific paid its tax April 18, 1934, and the \$569.74 of interest thereon July 27, 1934 (R. 146; cf. R. 202). Petitioner filed its amended petition February 5, 1940 (R. 50-78) and thus long after the statute of limitations had run on claims for refund. See petitioner's concession on this point. (Br. 4, fn. 8.)

²¹ The District Court found a waiver on a theory (R. 103), not urged here by petitioner, that the Commissioner waived objections to petitioner's right to sue on the assignment by not rejecting the refund claim on that ground. This theory, squarely contrary to *United States v. Garbutt Oil Co.*, *supra*,

It is clear, as the Circuit Court of Appeals held, that there was a variance. In its claims for refund, petitioner represented itself as assignee by contract of Pacific's claims for refund (R. 292). The Government's demurrer brought petitioner to the tardy realization that its claims as assignee by contract were ineffective under R. S. 3477 (31 U. S. C. 203; Appendix, *infra*, pp. 44-45). It then amended its complaint to appear in a new light, that of assignee by operation of law. In the new light it had standing to sue, in the old it had none. Obviously, then, the variance was material. As it was material, the conclusion seems logical, as the court below held, that the variance was likewise fatal. Neither a refund nor a judgment for one could properly have been predicated on the claim for refund, and a timely claim on valid grounds would have been barred at the time when the amended complaint was filed.²² Thus the condition for a suit for refund was not met. *United States v. Felt & Tarrant Co.*, 283 U. S. 269; *Real Estate Title Co. v. United States*, 309 U. S. 13, 17-18.

and *United States v. Andrews*, 302 U. S. 517, apparently was then abandoned by the District Court, since it proceeded to hold (R. 105) that petitioner's suit as assignee was barred by R. S. 3477 (31 U. S. C., 203).

²² See footnote 20; *supra*, p. 35.

CONCLUSION

Each of the foregoing points is an independent ground sufficient to support the decision below. We respectfully submit that it should be affirmed.

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Solicitor General.

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,

J. LOUIS MONARCH,

WARREN F. WATTLES,

VALENTINE BROOKES,

Special Assistants to the Attorney General.

DECEMBER 1943.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169, 259:

TITLE IV—MANUFACTURERS' EXCISE TAXES

* * * *

SEC. 602. TAX ON TIRES AND INNER TUBES.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, $2\frac{1}{4}$ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

* * * *

SEC. 621. CREDITS AND REFUNDS.

* * * *

(c) In no case shall interest be allowed with respect to any amount of tax under this title credited or refunded.

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate pur-

chaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

Agricultural Adjustment Act, c. 25, 48 Stat. 31:

TITLE I—AGRICULTURAL ADJUSTMENT

* * * *

Part 2—Commodity Benefits.

* * * *

PROCESSING TAX.

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the

time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided*, That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

* * * * *

(d) As used in part 2 of this title—

* * * * *

(2) In case of cotton, the term "processing" means the spinning, manufacturing, or other processing (except ginning) of cotton; and the term "cotton" shall not include cotton linters.

* * * * *

(7 U. S. C., 1940 ed., Sec. 609.)

* * * * *

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby. (7 U. S. C., 1940 ed., Sec. 614.)

SUPPLEMENTARY REVENUE PROVISIONS

* * * * *

FLOOR STOCKS

SEC. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

* * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648, 1747:

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT

* * * * *

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from

any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases. (7 U. S. C. 1940 ed., Sec. 647.)

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board").

* * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund

due any claimant with respect to such claim. * * *

(7 U. S. C. 1940 ed., Sec. 648.)

SEC. 913. DEFINITIONS.

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

(7 U. S. C. 1940 ed., Sec. 655.)

Revised Statutes

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must

be acknowledged by the person making them, before an officer having authority to take acknowledgment of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. (31 U. S. C. 1940 ed., Sec. 203.)

Treasury Regulations 46, Relating to Excise Taxes on Sales by the Manufacturer, promulgated under the Revenue Act of 1932:

ART. 71.¹ [As amended by T. D. 4358, XI-2 Cum. Bull. 516 (1932).] *Credits and refunds.*— * * * The claim for refund must be supported by evidence showing (1) the name and address of the person who paid to the United States the tax for which refund is claimed, (2) the date of payment, (3) the amount of such tax, and (4) the fact that the article was so used. A credit must be supported by evidence of the same character. If it is impossible to furnish such evidence at the time when the credit is taken, a statement to that effect must be submitted with the return in which the credit is taken. The evidence supporting such credit must be filed with the collector

¹The paragraphs of Article 71 herein quoted were re-phrased somewhat, without change of substance, by T. D. 4853, effective July 4, 1938 (1938-2 Cum. Bull. 383, 387-388). A new paragraph numbered (3) was added to Section 621 (a) of the Revenue Act of 1932, by Section 4 (c) of the Act of June 16, 1933, c. 96, 48 Stat. 254, 255, and this new paragraph was later amended by Section 401 (b), Revenue Act of 1935, c. 829, 49 Stat. 1014. The new paragraph of the act, however, is immaterial to the present controversy, as are also the several Treasury Decisions which add new paragraphs to Article 71 of Regulations 46, all designed to implement paragraph (3) of Section 621 (a) of the act.

within 30 days after the date on which the return is filed. If the required evidence is not so filed within that period, the amount of the credit will be disallowed and assessment of the tax resulting from the disallowance will be made on the current assess-

* * * * *

If any person overpays the tax due with one monthly return, he may either file a claim for refund on Form 843 or take credit for the overpayment against the tax due with any subsequent monthly return. In all cases (except those referred to in section 621 (a), discussed under the preceding paragraphs of this article) where a person overpays tax, no credit or refund shall be allowed, whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has either repaid the amount of the tax to the ultimate purchaser of the article or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written consent of the ultimate purchaser must accompany the sworn statement filed with the credit or refund claim. The statement supporting the credit or refund claim must also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed with the collector or Commissioner.

* * * * *

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FEB 21 1944

CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 158.

THE B. F. GOODRICH COMPANY,

Petitioner,

VS.

THE UNITED STATES,

Respondent.

PETITION FOR REHEARING.

WILLIAM H. BEMIS,

Attorney for Petitioner.

BAKER, HOSTETLER & PATTERSON,
Of Counsel.

February 21, 1944.



In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 158.

THE B. F. GOODRICH COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR REHEARING.

*To the Chief Justice and the Associate Justices
of the Supreme Court:*

Now comes the above-named petitioner, The B. F. Goodrich Company, and presents this its petition for rehearing of the above-entitled cause and, in support thereof, respectfully shows:

First: That as a result of the rulings and the statements made by the Court in the course of oral argument, petitioner was not accorded a reasonable opportunity to be heard upon the issue upon which this case was decided; and

Second: That the rights of the petitioner were prejudiced thereby, in that the Court erred in holding that the proviso in Section 9(a) of the Agricultural Adjustment Act was not applicable to processed cotton taxed under Section 16 of said Act.

**GROUND'S URGED IN SUPPORT OF PETITION
WITH SUPPORTING REASONS.
(Statement of Counsel.)**

I.

In 1934 the law firm of which I am a member rendered an opinion to The Rubber Manufacturers Association that, by virtue of the proviso in Section 9(a) of the Agricultural Adjustment Act, cotton taxed under Section 16 thereof was exempt from further tax under the Manufacturers' Excise Tax law. Subsequently, the Treasury Department having ruled contrary to such opinion, the firm of which I am a member was employed to bring suit to test such ruling. Accordingly, on January 4, 1936 my firm filed a suit in the Northern District of Ohio on behalf of The Goodyear Tire & Rubber Company for recovery of Excise taxes assessed and collected against said company. I tried that case in the District Court, secured a judgment in favor of the taxpayer, and on December 8, 1943, argued the case on the Government's appeal to the Court of Appeals for the Sixth Circuit. Similar suits for other rubber tire manufacturers involving the same issues were then pending in the District Court in Cleveland and Detroit awaiting the decision of the Court of Appeals in the Goodyear case.

Subsequent to the Government's appeal in the Goodyear case, this Court, in the instant case, had granted certiorari to review a decision of the Court of Appeals for the Ninth Circuit, which Court, without passing upon the question involved in the Goodyear case, had denied relief upon the sole ground that there was a variance between plaintiff's claim filed with the Commissioner of Internal Revenue and plaintiff's cause of action presented in the District Court. This was the sole issue presented in the petition for certiorari and the sole question presented in petitioner's main brief herein.

On December 10, 1943 the Government filed its answer brief in this case. Such answer brief asserted that the deci-

sion below should be affirmed upon grounds not considered by the Court of Appeals for the Ninth Circuit although argued by the Government in that Court and decided adversely to the Government by the District Court. That is, the Government argued (1) that the effect of the decision of this Court in *Butler v. United States* was to render the proviso in Section 9(a) inoperative *ab initio*, and (2) that in any event said proviso did not apply to cotton taxed under Section 16. As subordinate grounds for affirmance the Government's brief argued (3) that the record did not show that the tax sought to be recovered had not been passed on and (4) that there was a variance. The first two issues mentioned above were the same issues which the Government had previously asked the Court of Appeals for the Sixth Circuit to decide in the Government's appeal in the Goodyear case.

On December 14, 1943, Mr. E. Barrett Prettyman, then counsel for petitioner herein, for the reasons stated in his petition to withdraw as counsel filed herein, withdrew from this case, and thereafter I was employed to brief and argue the questions presented in the Government's answer brief.¹ The reason for my selection was that the Government had raised in this Court questions which I had argued in the Goodyear case and therefore I might be relied upon to protect the interests of the industry, including The B. F. Goodrich Company, in the questions thus sought to be decided.

This case was argued on January 3rd and 4th of this year. In the opening argument this Court declined to hear argument upon the merits, limiting argument to the sole question upon which certiorari had been granted. As a result of the express request of the Chief Justice during the opening argument, no time was devoted to the question

¹ Mr. Prettyman had been General Counsel for the Bureau of Internal Revenue in 1934 when the ruling referred to above was made.

upon which this Court has now decided the case. Time was not reserved for that purpose on rebuttal.

Following the opening argument the Court's ruling limiting argument was withdrawn. This was done, however, after Government's counsel had concluded his argument upon the procedural question and after the Chief Justice had stated, responsive to the claim that argument upon the merits was a matter of right, that the Court was not interested in the questions on the merits, that if the Court agreed with the decision of the court below the litigation would be ended, otherwise the case could be remanded for consideration of the other questions by the court below, but that since it was the Government's time which was being used counsel could spend it as he saw fit. On rebuttal, with approximately twenty minutes remaining to me, I asked for additional time to argue the questions on the merits and was advised that while I was then at liberty to argue such questions no additional time would be allowed for that purpose. In view of the Court's statements to the Government's counsel and in view of the insufficiency of time, no part of the closing argument was devoted to the question upon which this Court has now decided the case.

As the members of this Court know, lawyers who appear here have difficult decisions to make in determining how they shall employ their time in argument. Frequently such decisions must be made without deliberation and in the stress of unforeseen complications which arise in the midst of trial. Every lawyer is acutely conscious of the fact that he makes such decisions at his peril and that he may not complain if it subsequently develops that he took the wrong course. In turn, lawyers who enter this Court are entitled to believe that they will not be misled by the Court itself. It was not easy to decide, when permission was given on rebuttal, not to argue the two primary issues on the merits which I was prepared to argue, had been employed to argue, and had argued successfully in two lower

courts. Nevertheless, rightly or wrongly, I believed from what had occurred in Court that this Court would not consider the questions on the merits and that in arguing such questions, contrary to the views expressed by the Court, I would put myself in the position of joining my adversary in asking for a decision upon issues which the petitioner had not sought to raise in this Court, which the Court did not desire to hear argued, and this without adequate time for fair presentation and hence to the prejudice of the interests which I represented.

I realize that the decision in this case was by a unanimous Court. I file this petition because I believe that I have not received the kind of treatment which lawyers expect from judges who themselves were trained as lawyers and who know from such training what it means to be in the trenches. That I blame myself for what has occurred, namely, that the rights of my clients in this case and in other pending cases have been decided without my having spoken a word upon the issue decided, does not alter my belief that under the circumstances which occurred here the most experienced counsel might have been similarly misled by the statements from the bench. It does not alter my belief that what this Court has done in this case was unfair, and that it is my duty to say so. The fact, which is taken as of course, that the Court did not intend unfairly to restrict or influence counsel in the presentation of the case, is the strongest possible reason why this petition should be granted and the petitioner given an opportunity to have its day in court.

II.

That under the circumstances above discussed the petitioner was prejudiced by the decision of this Court, may be briefly pointed out.

1. To construe the Agricultural Adjustment Act, Sections 9(a) and 16, as creating two classes of cotton

subject to distinct and different tax obligations, renders the law discriminatory and absurd. It creates different values for identical supplies of the taxed commodity, depending upon the unrelated circumstance of the date when the cotton was processed, and this contrary to the purpose of the Act, and particularly Section 16 thereof.

2: The construction adopted by the Court not only creates different values for identical supplies of the taxed commodity, it creates different values for identical supplies taxed under the same Section, namely, Section 16. The Act makes no provision for the identification of cotton processed prior to the effective date of the law. Without some identification there was no way of distinguishing supplies previously taxed under Section 16 of the Act. Hence if Congress intended, as this Court has now held, that floor stocks (taxed under Section 16) should be taxable under the Manufacturers' Excise Tax law and that other indistinguishable supplies of processed cotton (taxed under Section 9(a)) should not be, it is necessary to impute to Congress the intent that *floor stocks* held by *tire manufacturers* on a particular day should be taxed a second time and that *floor stocks* held by *other taxpayers* on that day, even though later used in the manufacture of tires and sold for that purpose, should not be. The law as construed simply could not be otherwise enforced, and was never sought to be enforced except as to floor stocks held by tire manufacturers on August 1, 1933.

3. The plain consequences of this Court's construction of the law as asserted above have never been challenged by the Government nor has the Government, by brief or otherwise, ever claimed that such consequences were contemplated or intended by Congress. That Congress did not intend the law to be so

construed may not ~~successfully~~ be disputed on oral argument before this Court.

4. The conclusion of the Court that the literal language of the Act does not warrant the construction claimed by the petitioner ignores the fact that Congress did not designate the tax under Section 16 as a floor stocks tax but as an adjustment of the processing tax. The processing tax being subject to a proviso, it does not follow, even as a matter of literal construction, that the qualifying proviso was not intended also to apply to the tax imposed as an adjustment of such qualified processing tax.

5. The right to a refund of the amount of processing taxes upon supplies held at the expiration of the Agricultural Adjustment Act, provided for in Section 16 (a) (2) thereof, is a right running in favor of all taxpayers. It is not limited to stocks held by tire manufacturers. Furthermore, by its express terms Section 16 (a) (2) applies, under the Court's construction of the language of the Act, solely to cotton taxed under Section 9(a). Hence Section 16 (a) (2) could not have been intended, as this Court has held, as an adjustment to relieve against double taxation of *floor stocks* to which the tire manufacturer is otherwise subjected.¹

6. Prior to August 1, 1933, processed cotton contained in automobile tires was subject to a tax of two and one-fourth cents per pound under the Manufac-

¹ The Court holds that the term "processing tax" refers only to the tax under 9(a). Section 16 (a) (2) uses the language, "there shall be refunded * * * a sum * * * in an amount equivalent to the processing tax * * *." Consistently with the Court's ruling, this could not authorize a refund of any tax paid under Section 16 since this would be to hold that the tax on floor stocks was a "processing tax."

turers' Excise Tax law. From August 1, 1933 to January, 1936 the cotton content of automobile tires was subject to a tax of 4.4184 cents per pound under the Agricultural Adjustment Act. At the expiration of this latter tax, under the decision in the *Butler* case, the cotton content of automobile tires again became subject to the tax of two and one-fourth cents per pound under the Manufacturers' Excise Tax law. At all times the cotton content of automobile tires was subject to at least one tax.

The purport and effect of this Court's decision in the instant case is that cotton held by automobile tire manufacturers on August 1, 1933 was subject to two taxes, a tax under Section 16 of the Agricultural Adjustment Act and a further tax under the Manufacturers' Excise Tax law. There is nothing in Section 16 of the Agricultural Adjustment Act which relieves the taxpayer from such double taxation. Thus under the provisions of the law, as construed by this Court, all tires were at all times subject to one or the other tax and the particular tires containing cotton taxed under Section 16 of the Agricultural Adjustment Act were at all times subject to both taxes. Plainly this was not the intention of Congress.

CONCLUSION.

It is submitted that the questions upon which this Court has rendered its decision herein are questions of substance and importance. No decision was rendered upon the issue for which certiorari was granted. That issue was passed over to decide the questions summarized in the discussion above. These questions were decided without permission to petitioner for opening argument, vouchsafed by the rules of this Court, and with the intimation that permission to argue them accorded to respondent was accorded upon technical considerations. That questions of

substance should thus be decided, at the end of eight years of litigation, on collateral consideration to the review of an unrelated procedural issue, without argument and contrary to the decision of two District Courts and the Court of Appeals for the Sixth Circuit, is obviously highly prejudicial. For all of the foregoing reasons it is respectfully urged that this petition be granted.

Respectfully submitted,

WILLIAM H. BEMIS,

Attorney for Petitioner.

BAKER, HOSTETLER & PATTERSON,

Of Counsel.

February 21, 1944.

I, WILLIAM H. BEMIS, attorney for the above-named petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

WILLIAM H. BEMIS,

Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 158.—OCTOBER TERM, 1943.

The B. F. Goodrich Company, a Corporation, Petitioner, vs. United States of America.	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
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[January 31, 1944.]

Mr. Justice BLACK delivered the opinion of the Court.

This is a suit for refund of a portion of the manufacturers' excise tax on tires paid by the Pacific Goodrich Rubber Company, petitioner's wholly owned subsidiary, pursuant to Section 602 of the Revenue Act of 1932.¹ The District Court's judgment was for the Government, 48 F. Supp. 453, and the Circuit Court of Appeals affirmed, 135 F. 2d 456. Certiorari was granted on a petition which alleged that the Circuit Court's affirmance rested on its erroneous decision of procedural questions. We were asked in the petition to pass upon these issues: (1) Whether there was a material variance between the claim which had been denied by the Commissioner and that sued upon in the District Court. See R. S. § 3226, as amended; *United States v. Andrews, Executor*, 302 U. S. 517. (2) Whether, if there was such a variance, it had been, or could have been, waived by the Government in the proceedings in the District Court. See *United States v. Garbutt Oil Co.*, 302 U. S. 528. Argument at the bar and in the briefs of both parties was not, however, limited to these narrow procedural problems but also dealt with the merits of the claim for refund. This argument has disclosed that, regardless of the procedural questions, the judgment in favor of the Government can be supported on the ground that under the controlling tax statutes petitioner's claim has no merit. See *Helvering v. Gorran*, 302 U. S. 238, 245. We pass at once to a consideration of that decisive issue.

¹Sec. 602. Tax on Tires and Tyner Tubes.

"There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

"(1) Tires wholly or in part of rubber, 2¼ cents a pound on total weight
Revenue Act of 1932, c. 209, 47 Stat. 169, 261.

Petitioner claims it is entitled to the tax refund under provisions of the Agricultural Adjustment Act.² Section 9(a) of that Act authorized the imposition of a "processing tax" on the "first domestic processing" of basic agricultural commodities, including cotton. A proviso at the end of the section granted to manufacturers of certain products, including tires, a deduction from the excise tax on those products because of the payment of the "processing tax" on the cotton used in them.³ Another section of the Act, § 16, imposed a different tax, equal to the processing tax, on articles held in floor stocks on a certain date for sale or other disposition which articles had been "processed wholly or in chief value" from a basic agricultural commodity.⁴ This latter section did not grant any deduction from the manufacturers' excise tax because of the floor stocks tax. Nevertheless when the Pacific Goodrich Rubber Company computed its manufacturers' excise tax on tires it claimed deduction on account of the tax which it had paid on floor stocks of cotton fabrics. The Commissioner disallowed the deduction on the ground that, while deductions were allowable for cotton on which a "processing tax" had been paid under § 9(a), they were not allowable for cotton on which a tax on floor stocks had been paid under § 16. This suit is based on the premise that the deduction proviso of § 9(a) should be read into § 16.

248 Stat. 31.

3 "Provided, That upon any article upon which a manufacturers' sales tax is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid." 48 Stat. 36. Although the coverage of this proviso was not specifically limited to the excise tax on tires, the proviso came into § 9(a) as a Senate floor amendment introduced "to avoid an unduly burdensome tax on automobile tires." 77 Cong. Rec. 1959. The view was expressed on the floor of the Senate that, except for the proposed amendment, the cotton used in tires would be twice taxed by weight: once by the processing tax on cotton and again by the excise tax on tires. 77 Cong. Rec. 1960. See Note 1, *supra*.

4 Section 16, entitled "Floor Stocks", read in part as follows: "Sec. 16. (a) Upon the sale or other disposition of any article processed wholly or in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect . . . with respect to the commodity, is held for sale or other disposition . . . by any person, there shall be made a tax adjustment as follows:

"(1) Whenever the processing tax first takes effect, there shall be levied . . . a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date." 48 Stat. 44.

Within the literal meaning of the Agricultural Adjustment Act a tax on floor stocks was not a "processing tax", and therefore the proviso in § 9(a) which spoke only of a "processing tax" on cotton was not literally applicable to the tax on floor stocks imposed under § 16. The tax on floor stocks, though complementing the processing tax, was not a tax upon the "processing" of an agricultural commodity but upon articles already processed from such a commodity and held for sale or other disposition on the date when the processing tax on the commodity went into effect. Although the literal language of the Act does not authorize the deduction which it claims, petitioner contends that the purpose of Congress to relieve tire manufacturers from so-called "double taxation" on cotton contained in tires will be defeated⁵ unless we read into § 16 the proviso of § 9(a).⁶

With this contention we cannot agree. In the form in which the Agricultural Adjustment Act was introduced in Congress, neither § 9(a), which authorized the "processing tax", nor § 16, which authorized the floor stocks tax, contained a proviso granting a deduction from the manufacturers' excise tax.⁶ But § 16 of the bill did provide that under specified circumstances taxpayers subject to the floor stock tax would be entitled to a tax adjustment in the nature of a refund.⁷ When the bill was under consideration in the Senate, § 9(a) was amended by adding a proviso⁸ which authorized an adjustment on account of the "processing tax" in the nature of a deduction from the manufacturers' excise tax. Thus the bill as finally enacted provided one type of adjustment for the floor stocks tax in § 16 and a different type of adjustment for the processing tax in § 9(a). We have been pointed to nothing in the Act as a whole or its legislative

⁵ See Note 3, *supra*.

⁶ Senate Hearings on H. R. 3835, 73d Cong., 1st Sess., pp. 1, 3, 6.

⁷ Section 16(a) (2) of the original bill, subsequently enacted without amendment, provided that, "Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum . . . in an amount equivalent to the processing tax with respect to the commodity from which processed." In reporting on § 16 the House Committee on Agriculture stated that, "A corresponding refund is provided on floor stocks when the processing tax finally terminates." H. R. Rep. No. 6, 73d Cong., 1st Sess., 6.

⁸ The proviso originally introduced as an amendment to § 9(a) authorized an adjustment to be computed by deducting from the manufacturers' excise taxes on certain articles, including tires, "an amount equal to the processing tax paid on the cotton contained therein." 77 Cong. Rec. 1959. Subsequently the method of computing the permissible deduction was altered. See Conference Report accompanying H. R. 3835, printed as H. R. Report No. 100, 73d Cong., 1st Sess., 3; see also Note 3, *supra*.

history which shows that Congress considered these separate methods of adjusting the two taxes insufficient to prevent the burden of "double taxation" on the tire manufacturers so far as Congress wanted to prevent it. We cannot say, therefore, that the expressed intention of Congress is defeated by a literal interpretation of the Act which declines to read the proviso of § 9(a) into § 16.⁹ The judgment of the Circuit Court is accordingly

Affirmed.

⁹ Cf. *Moore, Collector of Internal Revenue v. The Goodyear Tire & Rubber Company*, decided by the Circuit Court of Appeals for the Sixth Circuit on January 24, 1944.